No. 73-1617

In the Supreme Court of the United States

October Term, 1973

United States of America, petitioner

v.

[illegible] DEPARTMENT [illegible], et al.

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA

v.

MARTIN DEWALT MAZURIE, ET AL.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF CERTIORARI OUT OF TIME UNDER RULE 22(2) OF THE RULES OF THIS COURT

The Solicitor General, on behalf of the United States, moves for leave to file a petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit out of time, under Rule 22(2) of the Rules of this Court.

1. Through an error of the Land and Natural Resources Division of the Department of Justice (the Division which has responsibility for this case but which normally handles civil cases in which there is a 90-day period after judgment within which to petition for a writ of certiorari), this decision, declaring portions of two federal statutes unconstitutional, was not brought to the attention of the Office of the Solicitor General until December 12, 1973, 35 days

after the court of appeals entered its judgment (on November 8, 1973). As explained in the attached petition, this decision is of great importance to numerous Indians living on reservations located in the Tenth Circuit, since its effect is to abolish all congressional or tribal regulation of liquor sales on fee lands within the reservations.

2. The 30-day time limit prescribed in Rule 22(2) of the Rules of this Court is "not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Schacht* v. *United States,* 398 U.S. 58, 64. This is an appropriate case for such a relaxation. While it is a criminal case in which each respondent was fined $100, it is more fundamentally a regulatory case in which the ultimate issue is whether there is to be any congressional or tribal control of liquor sales on fee lands in Indian country. The many reservation Indians whose welfare would be adversely affected by the court of appeals' decision had no control of the conduct of this litigation, and the government's error in not complying with Rule 22(2) was entirely inadvertent.

The United States therefore moves for leave to file the attached petition for a writ of certiorari out of time in this case.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, PETITIONER
v.
MARTIN DEWALT MAZURIE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The district court did not issue an opinion. Its judgment of conviction with general findings (App. C, *infra*) is not reported.

JURISDICTION

The judgments of the court of appeals (App. B1, B2, and B3, *infra*) were entered on November 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1154, which makes it a criminal offense to introduce spiritous liquor into Indian country, but excludes from the definition of Indian country "fee-patented lands in non-Indian communities", is unconstitutional as applied to respondents because the term "non-Indian community" is "indefinite and vague".

2. Whether 18 U.S.C. 1161, which permits sales of spiritous liquor in Indian country if in accordance with state law and "an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the federal register", is an unconstitutional delegation of authority by Congress to the Indian tribes.

3. Whether Congress has the authority, under Article 1, Section 8, Clause 3, and other provisions of the Constitution of the United States, to regulate and control the introduction of alcoholic beverages into Indian country, as defined by 18 U.S.C. 1151 and 1154.

STATUTES INVOLVED

18 U.S.C. 1151 provides in pertinent part:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation * * *

18 U.S.C. 1154 provides in pertinent part:

> (a) * * * whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.
>
> * * * * *
>
> (c) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

18 U.S.C. 1161 provides:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the In-

terior, and published in the Federal Register. (Added Aug. 15, 1953, ch. 502, § 2, 67 Stat. 586.)

STATEMENT

1. The Wind River Reservation is a major Indian reservation established by treaty in 1868 (Treaty of July 3, 1868, 15 Stat. 673) located in central Wyoming and occupied jointly by the Arapahoe and Shoshone Indian Tribes (the Wind River Tribes). See *Shoshone Tribe* v. *United States*, 299 U.S. 476. As a result of various allotment Acts, there are scatterings of non-Indian held land within the reservation,[1] as is the case with many reservations.[2] Such non-Indian held lands "within the limits of any Indian reservation" are within the definition of "Indian country" in 18 U.S.C. 1151.

Prior to 1953 federal legislation generally prohibited sales of liquor to reservation Indians and the introduction of liquor into Indian country. See 18 U.S.C. 1155. In 1953, however, Congress passed a local option Act which allowed Indian tribes, with the approval of the Secretary of the Interior, to permit the sale of liquor within Indian country (Act of August 15, 1953, Ch. 502, Sec. 2, 67 Stat. 586, 18 U.S.C. 1161). In 1953 the Wind River Tribes adopted an ordinance permitting the sale of liquor within the Reservation if done in accordance with Wyoming law. In February 1971 the Wind River Tribes passed a new ordinance

[1] The Bureau of Indian Affairs informs us that of the 2,288,500 acres within the Reservation, 403,422 are owned by non-Indians.

[2] See *Seymour* v. *Superintendent*, 368 U.S. 351; *Mattz* v. *Arnett*, 412 U.S. 481.

(Ordinance No. 26), which was approved by the Secretary of the Interior and published in the Federal Register, prohibiting the sale of liquor within the Indian country under their jurisdiction unless the seller has obtained a tribal license as well as a state license. App. A, *infra*, p. 19. See also stipulation, R. 74.[3]

2. The Blue Bull is a bar and liquor store located on land owned by Blue Bull, Inc., a Wyoming corporation. The corporation is owned by respondent Margaret Mazurie, and the bar is managed by her husband, Martin Mazurie (R. 74–75). The Mazuries operated the bar prior to the enactment of the 1971 ordinance and continued operating it hereafter (R. 75–76). Mr. Mazurie testified that the bar served both Indians and non-Indians, that there were sometimes "disturbances" at the bar; and that if the disturbance was by a non-Indian he would call the sheriff's office, if by an Indian he would call the tribal police at Fort Washakie (Tr 113–114).[4]

On April 3, 1972, an officer of the Bureau of Indian Affairs notified the Mazuries that they would be subject to criminal charges if they did not apply for a tribal license (R. 75, Tr. 101–103). On April 12, 1972, they applied for a tribal license to sell liquor on the Reservation (R. 75, 56–58). The tribes held a public hearing on the application on April 17, 1972, which Mr. Mazurie and the Mazuries' lawyer attended (R. 67–73).

[3] "R" refers to the one-volume Record on Appeal, a copy of which we are lodging with the Clerk.

[4] "Tr." refers to the one-volume Transcript of Trial Proceeding, a copy of which we are lodging with the Clerk.

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At that hearing one witness testified that the people at the bar had been "singing all night, shooting guns over there and meeting" and protested granting the license (R. 67). Another witness testified that there had been twelve killings on the reservation, the majority of which had to do with alcohol (R. 67). The Chairman of the Council termed the bar "a public nuisance" (R. 68). The Chairman of the Tribes' housing committee testified that drunks from the bar wander into a nearby Indian housing development at all hours of the night disturbing elderly members "who would like to be left alone and they can't get their proper rest" (R. 68). There was also a discussion of the problem of Indian minors being permitted at the bar, which Mr. Mazurie apparently admitted to be a problem (Tr. 71–72). Respondents' counsel spoke in favor of the bar, arguing that the Mazuries would do better in the future, that other bars had not been closed, and that the license fee to the tribes for the bar would be from $300 to $1500 per year (R. 68–70). At the end of the hearing the application was denied (R. 75).

For approximately three weeks following the denial of the tribal liquor license, the Blue Bull was closed. It thereafter reopened and continued in operation until June 13, 1973, when federal officers seized its alcoholic beverages. (See R. 30, Tr. 115–116).

3. This prosecution was initiated on June 29, 1972, when the United States attorney filed a criminal information in the United States District Court for the District of Wyoming charging that "within the exterior boundaries of the Wind River Indian Reservation and within the Indian Country [respondents] unlawfully, wilfully and knowingly did introduce * * * into the Indian Country malt and spirituous and vinous liquor and beer and ale and wine and ardent and intoxicating liquor" in violation of 18 U.S.C. 1154 (R. 1).[5]

The case was tried before a judge alone. The parties stipulated as to the ownership and management of the bar, its location on fee land within the Reservation, the application for and denial of a tribal license, and that witnesses would testify that they had purchased liquor at the bar after the denial of a license (R. 74–77). The evidence at trial showed that the Blue Bull is located on a ten-acre lot about three quarters of a mile from Fort Washakie, Wyoming, the central Indian community of the Reservation, that it is about 25 miles from Riverton, Wyoming, and 15 miles from Lander, Wyoming, the closest non-Indian communities, and that it is not located on a right-of-way.[6] There was no evidence that the Blue Bull was located in a non-Indian community. Mr Mazurie testified "we are kind of out there by ourselves, you know" (Tr. 114).

On the basis of this record, the district judge, who was also personally familiar with the area, found that

[5] The information also charged Bonnie Ellen Velasquez with the same offense, but the court dismissed the charge as to her on the ground that she, unlike respondents, did not knowingly violate the statute. Tr. 136.

[6] 18 U.S.C. 1154 excludes rights-of-way from the definition of "Indian country" for purposes of liquor regulation—thus allowing liquor to be transported on rights-of-way through reservations without tribal regulation.

the Blue Bull was located in Indian country as defined in 18 U.S.C. 1154 (App. C). The court held that Tribal Ordinance 26 was valid and that "The said defendants in dispensing intoxicants from the Blue Bull, Inc., absent a license from the Joint Business Council of the Shoshane and Arapohoe Tribes violated Section 1154 of Title 18 U.S.C." R. 29–32. The respondents were convicted and each was fined $100.

The court of appeals reversed (App. A). It did not find that respondents were selling liquor in a non-Indian Community, but instead held:

> that the terminology of "non-Indian community" is not capable of sufficiently precise definition to serve as an element of the crime herein considered, aside from other factors or elements with similar infirmities. The statute is thus fatally defective by reason of this indefinite and vague terminology.

As another basis for reversal, the court held that the provisions of 18 U.S.C. 1161, which permit the Indian tribes to set the criteria under which alcohol may be introduced into Indian country under their jurisdiction by adopting an ordinance so providing,[7] constitute an improper congressional delegation of authority to the Indian tribes (App. A, *infra,* pp. 26–27).

Finally, the court of appeals suggested[8] that Congress does not have the authority to regulate and control the sale of alcohol to Indians on fee-patented land owned by non-Indians within Indian reservations,

[7] The ordinance must be certified by the Secretary of the Interior and published in the Federal Register (18 U.S.C. 1161).

[8] See App. A, *infra*, p. 26.

stating: "It is obvious that the authority of Congress under the Constitution to regulate commerce with Indian Tribes is broad, but it cannot encompass the relationships here concerned" (App. A, *infra,* p. 27).

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals has seriously impaired, indeed has effectively abolished in a crucial area of the country, the congressional scheme for the control of alcoholic beverages on Indian reservations. The reservations are dotted with privately owned land, and, under this decision, anyone on such land who can obtain a state liquor license can operate a bar within the reservation free from regulation by the tribe or the federal government. This clearly was not the intent of Congress, which, with only two narrow exceptions (passage on rights-of-ways and sales in non-Indian communities) specifically prohibited the introduction of liquor to Indian reservations unless authorized by tribal ordinance.

Regulation of the sale of alcohol within reservation boundaries is of extreme importance to the Indian tribes. While intoxication is a problem throughout the country, it is a particularly serious problem for Indians. A recent study by the National Institutes of Health shows that the alcoholism death rate for Indians during the past few years has been approximately five times the rate for the country as a whole.[9] Of equal significance, the Bureau of Indian Affairs informs us that more than 95 percent of all crimes on

[9] National Institutes of Health, *Suicide, Homicide and Alcoholism among American Indians* (1973), pp. 25–31.

Indian reservations are committeed by persons under the influence of alcohol.

A substantial number of the Indian reservations in the United States are within the jurisdiction of the Tenth Circuit. Of the 25 reservations in that jurisdiction, only 8 permit the sale of alcohol within reservation boundaries (except, as the law requires, in non-Indian communities). The effect of the court of appeals' decision is thus to overturn the congressionally authorized decision of a majority of the tribes in the Circuit against permitting alcohol on their reservations, and to overturn the decision of others to regulate its introduction. Moreover, the court of appeals has not only held the present statute invalid for vagueness; its opinion would apparently also preclude any future legislative solution because it declares that Congress and the tribes are each without authority to regulate the sale of alcohol on privately owned land within reservations. As we shall explain, these holdings are contrary to decisions of this Court and of other courts of appeals. In light of the serious adverse impact of these holdings on reservation Indians, review by this Court is warranted.

2. The court of appeals' ruling that 18 U.S.C. 1154 (c) is void on its face for vagueness is inconsistent with this Court's decision in *United States* v *National Dairy Corp.*, 372 U.S. 29, 32–33. See, also, *Cox* v. *Louisiana*, 379 U.S. 559, 562; *Coats* v. *City of Cincinnati*, 402 U.S. 611, 619–621 (dissenting opinion).[10] These decisions make clear that in a case not involving

[10] See, also, *United States* v. *Raines*, 362 U.S. 17, 22.

First Amendment rights a statute should not be declared facially void for vagueness when in the case before the court it gives adequate warning of the conduct proscribed. As this Court said in *National Dairy Corporation, supra*, 372 U.S. at 32–33:

> The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. *E.g., Jordan* v. *De George*, 341 U.S. 223, 231 (1951), and *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947). Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation. *E.g., United States* v. *Rumely*, 345 U.S. 41, 47 (1953); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); see *Screws* v. *United States*, 325 U.S. 91 (1945).
>
> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged. *Robinson* v. *United States*, 324 U.S. 282 (1945).

The basic definition of Indian country in 18 U.S.C. 1151 and 1154 is clear and not in dispute. The concern of the court below as to vagueness was limited to the exception provided by 18 U.S.C. 1154(c) that for purposes of Section 1154 "Indian country * * * does not include fee-patented lands in non-Indian

communities." The exception does not permit sale of liquor on all patented lands within Indian reservations but only on such lands in non-Indian communities. Moreover, as the court of appeals correctly noted, the exception does not refer to "non-communities" (App A, *infra,* p. 22). Thus to fall within the exception the sale must be in a non-Indian community. As we have shown (see Statement, *supra,* pp. 9–10), and as the trial court found, respondents' bar was clearly not in a non-Indian community. It may be questionable whether it was in no community or in the Fort Washakie Indian community. But there is no basis for believing that it was in a "non-Indian community," in any realistic sense of these words. Moreover, the defendants had no uncertainty as to the Tribe's and the government's interpretation of the statute. After being notified by an officer of the Bureau of Indian Affairs of the statute's applicability to them, they applied for a permit and were refused it for cause; they then complied with, and only later chose to violate, the statute. And Mr. Mazurie's own testimony (p 9, *supra*) showed that he knew his bar was not in a non-Indian community. There is no reason to believe that in this case or, indeed, in the majority of cases the people affected by the statute will have substantial doubt as to whether they can legitimately claim to be in a non-Indian community.[11]

[11] The phrase "dependent Indian communities" used in 18 U.S.C. 1151 to define Indian country *outside* a reservation has not presented the Tenth Circuit with similar problems. See *United States* v. *Martine*, 442 F. 2d 1022.

3. The decision below also conflicts with the decision of the court of appeals for the Eighth Circuit in *Buster* v. *Wright,* 135 Fed. 947, 950, appeal dismissed, 203 U.S. 599. See, also, *Iron Crow* v. *Oglala Sioux Tribe,* 231 F. 2d 89, 98–99 (C.A. 8). In *Buster* v. *Wright,* the Eighth Circuit ruled that Indian tribes have the inherent authority to license and tax non-Indians conducting business on fee patented land within the exterior boundaries of their reservations. The court specifically rejected the proposition now adopted by the Tenth Circuit that the grant of patents to the land ended the Tribe's governmental authority and held that that authority continues except as limited by Congress. 135 Fed. at 952. Indeed in *Buster* v. *Wright* the tribal regulation at issue applied to all trade, not just liquor, and there was no Act of Congress specifically authorizing the regulation. Here, by contrast, Congress has itself provided the prohibition and specifically established compliance with tribal regulations as a defense, with the requirement that the tribal ordinance be approved by the Secretary of the Interior, as was done (R. 74).

In holding that Congress exceeded its authority in authorizing such regulation by an Indian tribe, the court below characterized the tribe as "a private, voluntary organization, which is obviously not a governmental agency" (App. A, *infra,* p. 27) and which cannot exercise authority over non-members or over land it does not own (*ibid.*). This characterization, however, ignores the consistent line of cases from *Worcester* v. *Georgia,* 6 Pet. 515, to *McClanahan* v. *Arizona State*

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Tax Commission, 411 U.S. 164, holding that Indian tribes are governmental units which properly exercise governmental powers within their reservation boundaries. Accordingly, the limited authority vested in the tribes under the present statutory scheme (to grant exceptions to the congressional prohibition within the boundaries of their own reservations) is entirely proper, especially when adjudged, as it should be, against the background of the Indian sovereignty doctrine on which such decisions as *Buster* v. *Wright* were based. See *McClanahan, supra,* 411 U.S. at 169–172.

4. The court below also suggested (App. A, *infra,* p 27) that Congress itself lacks authority to regulate sales of liquor on privately held lands within Indian reservations. This Court has held to the contrary. *Perrin* v. *United States,* 232 U.S. 478.

Ample power for such regulation is conferred on Congress by Article I, Section 8 of the Constitution, which authorizes it to regulate commerce "among the several States, and with the Indian Tribes" and to enact all laws "necessary and proper for carrying into execution * * * all * * * Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," including the treaty power and the proprietary powers of Article IV, Section 3. See *Perrin, supra,* 232 U.S. at 482–485; see also *Worcester* v. *Georgia, supra,* 6 Pet. 515 at 559; *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
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DECEMBER 1973.

APPENDIX A

United States Court of Appeals, Tenth Circuit

SEPTEMBER 1973 TERM

Nos. 73-1077, 73-1078, 73-1079

UNITED STATES OF AMERICA, APPELLEE

v.

MARTIN DEWALT MAZURIE, MARGARET J. MAZURIE, AND THE BLUE BULL, INC., APPELLANTS

Appeal from the United States District Court for the District of Wyoming (D.C. No. 8570)

Before LEWIS, Chief Judge, SETH and HOLLOWAY, Circuit Judges

SETH, *Circuit Judge*

The appellants were prosecuted on an information charging them with the introduction of liquor into "Indian Country." They were tried by the court, found guilty of a violation of 18 U.S.C. § 1154, and have taken this appeal.

The prosecution was instituted because the defendants did not have a license for their tavern from the Arapahoe and Shoshone Indian Tribes (the Wind River Tribes), permitting the sale of liquor. The tavern of defendants where the charged offense took place is located on land owned in fee by them, but within the boundaries of the Wind River Indian Reservation. The business was licensed under the laws of

Wyoming by Fremont County, and had been so operating since 1954. The appellants are not Indians.

The Wind River Tribes in 1953 adopted a regulation which permitted the sale of liquor within the Reservation if it was done in accordance with Wyoming law with no additional requirements. In 1971, however, the Tribes adopted a new regulation which required persons in defendants' position to also obtain a license from the Tribes. The defendants at the time of the charged offenses did not have such a license, and this the Government asserts was contrary to 18 U.S.C. § 1161, which section in effect requires such a tribal license to avoid a violation of 18 U.S.C. § 1154 if the sale of liquor is in "Indian Country," and under "jurisdiction" of the Tribe, and not in a "non-Indian community" as the terms appear in 18 U.S.C. § 1154(c). Thus the issues on appeal relate to these exceptions or conditions provided in 18 U.S.C. § 1154(c); to the provisions for tribal licensing in 18 U.S.C. § 1161; and to the application of those provisions to a business on lands patented by the United States to defendants' predecessors in fee.

The Wind River Reservation covers a gross area of something more than one hundred townships and is roughly in the form of a square. Within the boundaries is the town of Riverton, Wyoming, and several small communities. About 4,500 Indians live on the Reservation, that is, persons who are enrolled by the Tribes as members. The Reservation is crossed by two or three principal highways. There are several hundred separate tracts of fee land within the boundaries which in total area would be roughly one-fifth of the Reservation. Some of these fee tracts consist of twenty or thirty contiguous sections or more, and some are just a few acres. The balance of the acreage consists of trust lands, some Indian allotments, and

large tracts of Government land. The Reservation is occupied by the Shoshone and Arapahoe Tribes who have beneficial title. See Shoshone Tribe v. United States, 299 U.S. 476.

The appellants' tavern is located within the exterior boundaries of the Reservation on a small tract of land patented in fee by the United States in 1954 under 24 Stat. 390 and 34 Stat. 182 to appellants' predecessors. The patent contains no restrictions as to the use to which the land may be put. The land is taxed by the State of Wyoming, and the state provides the usual public services for it. It is in a Fremont County School District which provides schools for the area, and on a county road.

There is no issue as to the presence of liquor at the tavern which was the incident on which the "introduction" count of the information was based.

There are several interrelated conditions and definitions, referred to above, which must be established under the several sections of the statute for there to be a violation. For example, the place where the sale took place must be in "Indian Country," under 18 U.S.C. §§ 1154 and 1161, but *not* on "fee-patented" land in "non-Indian communities." Also the sale must *not* be in "conformity" with state laws *and* tribal regulations of the Tribe "having jurisdiction" over the area of Indian country. 18 U.S.C. § 1161. These definitions or requirements must be examined as a part of the crime charged.

We are thus concerned with the elements of this crime, and not the frequently encountered question of whether state or federal *jurisdiction* exists over certain crimes which is determined by the place where they were committed. 18 U.S.C. §§ 1151, 1152, 1153. Instead the geographical-land status terms and the substance and effect of tribal regulations thus become part of the elements of a crime, and if not shown the act was a legal one.

The type of business engaged in by the appellants is what has now become a regulated retail business which has been legalized by the United States and licensed under the laws of the State of Wyoming. Thus the selling of liquor to Indians at a tavern licensed by the state is, of course, not a federal crime per se, but can become one under certain conditions, the definition of which, and the problem of proof of the existence of which, are hereinafter described.

The first consideration must be given to the term "non-Indian community" as used in 18 U.S.C. § 1154 (c). This subsection was added by the Act of May 24, 1949, § 27(b). See U.S. Code Cong. & Ad. News, 1949, p. 1248. The reported congressional history does not provide much help in arriving at the intended construction of the term.

18 U.S.C. § 1154 provides in part:

> (a) * * * [W]hoever introduces * * * any * * * spiritous, or vinous liquor, including beer, * * * into the Indian country, shall, * * * be fined * * *.
>
> * * * * *
>
> (c) The term 'Indian country' as used in this section does not include fee-patented land in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto. June 25, 1948, c. 645, 62 Stat. 758; May 24, 1949, c. 139, § 27, 63 Stat. 94.

18 U.S.C. § 1161 provides:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor

> to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register. (Added Aug. 15, 1953, ch. 502, § 2, 67 Stat. 586.)

The basic statute (18 U.S.C. § 1154) originally made it a crime to sell liquor to certain Indians at any location, or to introduce liquor into "Indian Country." By subsection (c), it was then provided that "Indian Country" as used in the section "* * * does not include fee-patented lands in non-Indian communities.* * *" Thus if it is assumed for the moment that the fee land in question is in "Indian Country," generally, the question whether the particular place was also in a "non-Indian community" must be resolved if it can be. If the tavern was in a "non-Indian community" in "Indian Country," no crime was committed. The statute does *not* refer to "Indian communities" nor to non-communities.

The proof in the record herein of this element of the crime is inconclusive and indefinite. It showed that the tavern was located from one-half to three-quarters of a mile from the Reservation headquarters at Fort Washakie where there were located about eight business places. In the twenty square mile area surrounding the agency, it was estimated there were 170 Indian families and forty-one non-Indian families. The witnesses called by the Government were unable to define any boundaries of Fort Washakie. Mr. Harris, Chairman of the Shoshone Business Council, testified that the place in issue was not an "Indian community." The Reservation Superintendent testified there were no community boundaries which could be defined, and

he could not testify that the location was in an Indian community. An examination of the record on this issue demonstrates that the inability of the witnesses to testify with specificity stems from the lack of any standards or any definition for the term. It was not clear to the witnesses what a "community" was, nor what was meant by "non-Indian." All that the proof shows was that the location was probably not in an Indian community; however, the statute refers only to "non-Indian communities."

The term "non-Indian community" could apply to towns such as Riverton, which is located within the exterior boundaries of the Wind River Reservation, and perhaps to other smaller settlements along the highways, but when the specific place here concerned is considered the problem is apparent. There is no standard provided as to what percentage of Indians or non-Indians is contemplated. Thus if a given area can be selected as a "community," the statute does not indicate that if there are more Indians than non-Indians, it becomes an Indian community, or what the "community" is if there are a greater or lesser comparative number of Indians. The Act also does not state who is an Indian. There are acts for other purposes which use twenty-five per cent Indian blood as the standard; others leave the test up to the Tribe concerned. Thus perhaps tribal membership is the test. However, if the twenty-five per cent test is used, individuals who are seventy-five per cent non-Indian could be counted to make up an "Indian" community, but in any event there is no guide as to this whatsoever.

It is also apparent that what constitutes a "community" for this purpose is not defined nor can it be clearly ascertained. In an area where the defendants' business was located, there were apparently some

few scattered houses, although the record is not clear, but the witnesses did not have any standard on which to base their testimony. As mentioned, the nearby Fort Washakie had no definable boundaries, if it was a community, and the witnesses thus could not testify whether the bar was in it or not. There was thus no proof as to whether it was in a community or not in one, or if in one, what kind. Again, the proof failed because the statute contains no reasonably ascertainable standards.

Under these indefinite and vague conditions, the business generally, or isolated transactions legal under state law, could be either a federal crime or perfectly legal. We must hold that the terminology of "non-Indian community" is not capable of sufficiently precise definition to serve as an element of the crime herein considered, aside from other factors or elements with similar infirmities. The statute is thus fatally defective by reason of this indefinite and vague terminology.

Vagueness in a non-First Amendment case has been considered by the Supreme Court in *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, and *Connally* v. *General Construction Co.*, 269 U.S. 385. Under these standards the provision must not require persons of usual intelligence to guess as to its meaning nor differ as to its application. The vagueness issue was fully explored by the First Circuit in *Gogueu* v. *Smith*, 471 F. 2d 88 (1st Cir.). The statute here concerned is an isolated one, and not part of a general regulatory plan. It was applied in the trial court, and here urged by the Government, as containing a requirement (being in a non-Indian community) to be demonstrated at trial by the defendants. The placing of such a burden on defendants was improper. *Grunewald* v. *United States*, 353 U.S. 391.

The Supreme Court in *Seymour* v. *Superintendent*, 368 U.S. 351, considered the question as to whether a

charge of burglary against an Indian could be prosecuted by state or federal authorities. Here again a crime covered by 18 U.S.C. § 1152 in Indian country (section 1151) was considered. The location where the crime took place was fixed, and it was on privately owned land, but the Court reaffirmed the broad interpretation of Indian country, and mentioned the problems under section 1152 if the law enforcement officials had to search the tract books to decide whether jurisdiction over a particular crime was in the state or the United States. See also the checkerboard land status cases, *Ellis* v. *Page*, 351 F. 2d 250 (10th Cir.); *Hilderbrand* v. *Taylor*, 327 F. 2d 205 (10th Cir.), and *Martinez* v. *Southern Ute Tribe*, 249 F. 2d 915 (10th Cir.). Under this record this problem of law enforcement is not serious as the officers have dual authority; however, this is not the type of crime, nor a crime committed by an Indian, which we are considering. There is no policy or need for a broad interpretation of "Indian Country," under these conditions. There is instead a fixed place of business, the crime charged is against non-Indians, and the question is whether additional licensing was required. We do not reach the question as to whether the definition of "Indian Country" in 18 U.S.C. § 1151 is applicable only to the ten major crimes, as defendant urges, or is applicable to other transactions, as the Government contends.

The issue is also raised on the fundamental question of the authority of the Government or of the Tribes to regulate the defendants' business in a way that *a failure to conform constitutes a crime*. As indicated above, we are concerned with a business operating at a fixed place and legal under Wyoming laws. This business would have also been legal, under the Government's theory, if defendants had a license from the Wind River Tribes. The failure to have such a license

thus resulted in this prosecution. The Government has thus delegated to the Tribes the unrestricted power to determine whether the operation of defendants' business constitutes a federal crime or not. Whatever regulation the Tribe adopts is enforced under the wording of the statute (18 U.S.C. § 1161), and any non-conformity therewith to whatever degree is a criminal offense.

If the Government has the power to regulate a business on the land it granted in fee without restrictions, which we doubt, it cannot delegate the power above described to the Tribes. There is no theory of sovereignty or governmental subdivision which would support such a delegation.

The Tribes have the usual powers of an owner of land, to the extent of such ownership, over those using their lands. This power is often confused with some elements of sovereignty when large tracts are involved, and when only the relationship between a Tribe and the Government is examined. The decisions relating to the sovereignty of certain tribes are in the context of relationships between a Tribe and the federal or state government. This relationship is influenced and derived from treaties, and relates to lands and taxes. See *United States* v. *Mason,* —— U.S. ——, 41 U.S.L.W. 4771; *McClanahan* v. *Arizona Tax Comm'n,* —— U.S. ——, 41 U.S.L.W. 4457; *Mescalero Apache Tribe* v. *Jones,* —— U.S. ——, 41 U.S.L.W. 4451.

The Arapahoe and Shoshone Tribes are very important organizations which exercise a broad tribal authority over their members. They also exercise authority as would owners of large tracts of land. Their membership is limited to persons of a certain parentage or lineage as determined from time to time by the respective Tribes or by custom. Others are excluded. The membership can be described as voluntary, and

the record indicates that a person with at least twenty-five per cent Arapahoe blood could be enrolled as a member of such Tribe, and the same for the Shoshone Tribe.

The tribal members are citizens of the United States. It is difficult to see how such an association of citizens could exercise any degree of governmental authority or sovereignty over other citizens who do not belong, and who cannot participate in any way in the tribal organization. The situation is in no way comparable to a city, county, or special district under state laws. There cannot be such a separate "nation" of United States citizens within the boundaries of the United States which has any authority, other than as landowners, over individuals who are excluded as members.

The authority in the custom-usage sphere over members is, of course, another matter. The Government cites *Iron Crow* v. *Oglala Sioux Tribe,* 231 F. 2d 89 (8th Cir.), as authority for a general power to supervise business on the Reservation. We do not consider the case to so hold; instead it is authority for the assertion of tribal authority over members of the Tribe and this only.

The purported delegation of authority to the tribal officials contained in 18 U.S.C. § 1161 is therefore invalid. Congress cannot delegate its authority to a private, voluntary organization, which is obviously not a governmental agency, to regulate a business on privately owned lands, no matter where located. It is obvious that the authority of Congress under the Constitution to regulate commerce with Indian Tribes is broad, but it cannot encompass the relationships here concerned.

Under 18 U.S.C. § 1161, neither the lands in issue,

nor the defendants, were under or within the "jurisdiction" of the Tribes.

The judgment is set aside and the case is REVERSED with instructions to dismiss each of the informations.

APPENDIX B1

September Term—November 8, 1973

No. 73-1077

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARTIN DEWALT MAZURIE, DEFENDANT-APPELLANT

Before Honorable DAVID T. LEWIS, Chief Judge, Honorable OLIVER SETH, Honorable WILLIAM J. HOLLOWAY, JR., Circuit Judges

Shoshone and Arapahoe Tribes of the Wind River Indian Reservation Amicus Curiae

This cause came on to be heard on the record on appeal from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof IT IS ORDERED that the judgment of the United States District Court for the District of Wyoming is set aside and the case is reversed with instructions to dismiss the information in accordance with the opinion of this Court.

HOWARD K. PHILLIPS,
Clerk.

APPENDIX B2

September Term—November 8, 1973

No. 73-1078

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MARGARET J. MAZURIE, DEFENDANT-APPELLANT

Before Honorable DAVID T. LEWIS, Chief Judge, Honorable OLIVER SETH, Honorable WILLIAM J. HOLLOWAY, JR., Circuit Judges

Shoshone and Arapahoe Tribes of the Wind River Indian Reservation Amicus Curiae

This cause came on to be heard on the record on appeal from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof IT IS ORDERED that the judgment of the United States District Court for the District of Wyoming is set aside and the case is reversed with instructions to dismiss the information in accordance with the opinion of this Court.

HOWARD K. PHILLIPS,
Clerk.

APPENDIX B3

September Term—November 8, 1973

No. 73-1079

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

THE BLUE BULL, INC., A CORPORATION, DEFENDANT-APPELLANT

Before Honorable DAVID T. LEWIS, Chief Judge, Honorable OLIVER SETH, Honorable WILLIAM J. HOLLOWAY, JR., Circuit Judges

Shoshone and Arapahoe Tribes of the Wind River Indian Reservation Amicus Curiae

This cause came on to be heard on the record on appeal from the United States District Court for the District of Wyoming and was argued by counsel.

On consideration whereof IT IS ORDERED that the judgment of the United States District Court for the District of Wyoming is set aside and the case is reversed with instructions to dismiss the information in accordance with the opinion of this Court.

HOWARD K. PHILLIPS,
Clerk.

APPENDIX C

[Filed November 22, 1972, A. Marvin Helart, Clerk]

In the United States District Court For the District of Wyoming

No. 8570, Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MARTIN DEWALT MAZURIE, MARGARET J. MAZURIE, THE BLUE BULL, INC., A CORPORATION, AND BONNIE ELLEN VELASQUEZ, DEFENDANTS

Judgment of Conviction With General Findings

The above entitled matter having come on regularly for trial before the Court, without a jury, such being properly waived by all parties, plaintiff appearing by and through its attorney Richard V. Thomas, United States Attorney for the District of Wyoming, and defendants Martin Dewalt Mazurie, Margaret J. Mazurie and The Blue Bull, Inc., appearing by and through their attorney, Charles E. Hamilton, and defendant Bonnie Ellen Velasquez appearing by and through her attorney, John R. Hursh. The Court having heard all the evidence presented took the matter under advisement, and after having carefully reviewed the pleadings, exhibits, memoranda and all other material on file herein, and being fully advised in the premises, the Court makes the following general Findings:

FINDINGS

1. This is a criminal action in which defendants are charged with unlawfully, wilfully and knowingly introduce into Indian Country malt and spirituous and vinous liquor and beer, ale and wine and ardent and intoxicating liquors in violation of Title 18 U.S.C. Sections 1154 and 2.

2. The defendant Bonnie Ellen Velasquez was acquitted of the charge against her, and judgment was entered to that effect on October 13, 1972.

3. The defendants Martin Dewalt Mazurie and Margaret J. Mazurie owned and operated the Blue Bull, Inc., a corporation, within the exterior boundaries of the Wind River Indian Reservation. The Blue Bull, Inc., engaged in the sale of intoxicating beverages.

4. The said defendants and Blue Bull, Inc., were operating under a valid retail liquor license issued by the County Commissioners of Fremont County, Wyoming.

5. That both the Arapahoe General Council and the Shoshone General Council adopted, and passed Ordinance No. 26 during the month of February 1971.

6. Ordinance No. 26 prohibited the sale of intoxicating beverages within the "Indian Country" under the jurisdiction of the Tribes unless a license was first obtained from the Tribes.

7. The said defendants filed an application with the Joint Business Council of the Shoshone and Arapahoe Tribes for a license to sell intoxicating beverages on April 12, 1972, and thereafter the Joint Business Council denied said application.

8. The said defendants continued to sell intoxicating beverages at the Blue Bull, Inc., after their application for an Indian license was denied.

9. The Blue Bull, Inc., was located in the exterior boundaries of the Wind River Indian Reservation, on land owned by the Blue Bull, Inc, in fee.

10. The Blue Bull, Inc., is situated approximately two and one-half miles from the Public School on the Reservation at a site known as Fort Washakie, Wyoming.

11. That Fort Washakie is not an incorporated non-Indian community with recognized boundaries.

12. That on June 10, 1972, an enrolled Shoshone Indian, who resided near Fort Washakie, purchased a six pack of beer from Martin Mazurie at the Blue Bull bar.

13. That the Court has jurisdiction of the parties and the subject matter of this action.

14. The area known as Indian Country is defined by Title 18 U.S.C. § 1151.

15. Title 18 U.S.C. Section 1161, provides as follows:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country *provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.* [Emphasis supplied.]

16. The federal government retains jurisdiction over deeded land to non-Indians in fee which is located within the exterior boundaries of an Indian reservation. See *Seymour* v. *Superintendent,* 368 U.S. 351 (1962), *Beardslee* v. *United States,* 387 F. 2d 280 (8th

Cir. 1967), and *Hilderbrand* v. *Taylor,* 327 F. 2d 205 (10th Cir. 1964).

17. This Court therefore holds that although said defendants operated the Blue Bull, Inc., on land deeded to them in fee, such land is in Indian Country and therefore subject to federal law.

18. The provisions of 18 U.S.C. 1154, prohibiting the sale of intoxicants in Indian Country does not apply when the sale of intoxicants is in conformity both with the laws of the State where the Indian Country is located and with an ordinance" * * * duly adopted by the tribe having jurisdiction over such area of Indian Country, certified by the Secretary of Interior, and published in the Federal Register". 18 U.S.C. § 1161.

19. Ordinance No. 26 as adopted by the Shoshone and Arapahoe Tribes is in complete compliance with 18 U.S.C. § 1161.

20. Although the said defendants were distributing intoxicants pursuant to a valid state retail liquor license, they were doing so in Indian Country without a license issued by the Joint Business Council of the Shoshone and Arapahoe Tribes in violation of Ordinance No. 26.

21. The said defendants in dispensing intoxicants from the Blue Bull, Inc., absent a license from the Joint Business Council of the Shoshone and Arapahoe Tribes violated Section 1154 of Title 18, U.S.C.

The Court, after having heard all the evidence and considered all facts and circumstances of the case, including the federal statutes applicable to Indian Country finds that the United States has proven the defendants Martin Dewalt Mazurie, Margaret J. Mazurie and the Blue Bull, Inc., a corporation, guilty beyond a reasonable doubt. It is therefore

ORDERED that the said defendants be, and they are hereby, found guilty on Count 1 of the information filed herein.

Dated this 22nd day of November, 1972.

IRVING R. KERR,
Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1973

MOTION FILED

JAN 4 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA,
Petitioner,

v.

MARTIN DeWALT MAZURIE, *et al.*,
Respondents.

MOTION OF SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER INDIAN RESERVATION, WYOMING, FOR LEAVE TO FILE STATEMENT AMICI IN SUPPORT OF MOTION OF UNITED STATES FOR LEAVE TO FILE A PETITION FOR A WRIT OF CERTIORARI OUT OF TIME

AND

STATEMENT OF SHOSHONE AND ARAPAHOE TRIBES IN SUPPORT OF MOTION OF UNITED STATES FOR LEAVE TO FILE OUT OF TIME A PETITION FOR A WRIT OF CERTIORARI UNDER RULE 22(2)

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IN THE

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No. 73-1018

UNITED STATES OF AMERICA,
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Respondents.

MOTION OF SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER INDIAN RESERVATION, WYOMING, FOR LEAVE TO FILE STATEMENT AMICI IN SUPPORT OF MOTION OF UNITED STATES FOR LEAVE TO FILE A PETITION FOR A WRIT OF CERTIORARI OUT OF TIME

The Shoshone Indian Tribe and the Arapahoe Indian Tribe of the Wind River Indian Reservation, Wyoming move for leave to file, as *amici*, the accompanying statement in support of the motion of the United States for leave to file a petition for a writ of certiorari out of time.

In support of this motion, the Tribes show that they are the real parties in interest; that the decision below denies the protection of the Indian liquor laws to the Indians of the Wind River Reservation; and that the Tribes are the helpless victims of a mistake made by the Department of Justice in failing to file a petition for a writ of certiorari within the 30 days prescribed by Rule 22(2).

In the interest of justice, the Tribes urge that the Court grant this motion and the motion of the United States.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA,
Petitioner,
v.
MARTIN DeWALT MAZURIE, *et al.*,
Respondents.

STATEMENT OF SHOSHONE AND ARAPAHOE TRIBES IN SUPPORT OF MOTION OF UNITED STATES FOR LEAVE TO FILE OUT OF TIME A PETITION FOR A WRIT OF CERTIORARI UNDER RULE 22(2)

1. *The Tribes and their people are the real parties in interest and will suffer the consequences of the decision below.* The Wind River Indian Reservation established by treaty in 1868 is owned and occupied by the Shoshone and Arapahoe Indian Tribes. See *Shoshone Tribe v. United States*, 299 U.S. 476. It is Indian country (18 U.S.C. 1151). The Indian liquor laws (18 U.S.C. 1151-1156) were enacted for the protection of Indians in Indian country. Congress gave Indian tribes the option of deciding whether they wished liquor in Indian country, except as to nonIndian communities in Indian country. (18 U.S.C. 1161.)

2. *The Tribes and their people had no choice but to rely on the United States in the management of the*

litigation. The Indian liquor laws are criminal statutes. Their enforcement is within the exclusive power of the United States. The Tribes had no choice but to rely upon the United States in the management of the litigation. The Tribes did what they could and appeared in the proceeding below as *amici.*

3. *The Tribes and their people should not be penalized for the administrative confusion leading to the failure to file within the prescribed 30 days.* The Indian liquor laws, while in the criminal code, in a real sense are laws regulating liquor traffic in Indian country. In this case, the primary issues presented under those laws are issues of Indian law, not criminal law. For that reason, this case fell within the administrative jurisdiction of the Land and Natural Resources Division of the Department of Justice, the division responsible for litigation relating to Indian matters. The Tribes urged the Department of Justice to seek review of the decision below and relied upon the United States to timely file a petition for a writ of certiorari. As explained in the motion of the United States, confusion arose over the time within which the petition should be filed, because the Lands and Natural Resources Division ordinarily handles civil Indian litigation where the time for filing is 90 days. But, surely, it is not in the interest of justice to permit the damages flowing from the Government's mistake to fall on the Tribes and their people.

The respondents in this case are now operating their liquor establishment and have been ever since the court of appeals issued its mandate. The Government requested no stay of mandate. The Tribes were powerless to do so. The Superintendent of the Wind River Indian Agency advises that since the decision below, another liquor business has opened in the Crowheart district of the

reservation, although the governing body of the Tribes had denied a license for that business following a public meeting of the Indian people of the district on the issue. The Superintendent further advises that since the decision below the local board of county commissioners has issued another liquor license and the licensee is now preparing to open for business on the reservation.

CONCLUSION

The Tribes, as the real parties in interest and the potential victims of a mistake beyond their control, urge the Court to grant the motion of the United States to allow the petition for a writ of certiorari to be filed out of time.

Respectfully submitted,

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MOTION FILED

JAN 29 1974

No. 73-1016

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, *Petitioner*,

v.

MARTIN DEWALT MAZURIE, ET AL., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION IN SUPPORT OF (A) THE MOTION OF THE UNITED STATES FOR LEAVE TO FILE A PETITION FOR A WRIT OF CERTIORARI OUT OF TIME AND (B) THE PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA, *Petitioner,*

v.

MARTIN DEWALT MAZURIE, ET AL., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION IN SUPPORT OF (A) THE MOTION OF THE UNITED STATES FOR LEAVE TO FILE A PETITION FOR A WRIT OF CERTIORARI OUT OF TIME AND (B) THE PETITION FOR CERTIORARI

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Tribal Chairmen's Association is an unincorporated, non-profit organization of all duly constituted chairmen, presidents, governors and chiefs of federally recognized Indian tribes, and the presi-

dents of the twelve Alaska Regional Corporations established under the Alaska Native Claims Settlement Act. The Association and all of its members are vitally interested in preserving and protecting the sovereignty of Indian tribes which would be significantly undercut if the decision of the Court of Appeals for the Tenth Circuit is allowed to stand.

The decision below would not only destroy the Congressional scheme for controlling liquor sales within Indian reservations, it would also have far-reaching, equally destructive, effects on all areas subject to tribal regulatory control. The petition of the United States and the Amicus Brief of the Wind River Tribes emphasize the liquor control problem while the Association's Amicus Brief deals with the broader implications of the Tenth Circuit's decision.

Through what the United States admits was an inadvertent error, a petition for a writ of certiorari was not timely filed. The National Tribal Chairmen's Association asks leave to file the attached Brief Amicus Curiae to call attention to all of the disastrous consequences of the Tenth Circuit's decision and to pray that the government's inadvertent error not penalize the nation's Indian tribes by precluding review and reversal by this Court.

Respectfully submitted,

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January, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA, *Petitioner,*

v.

MARTIN DEWALT MAZURIE, ET AL., *Respondent.*

BRIEF OF AMICUS CURIAE NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION

The Tenth Circuit Court of Appeals held that a specific Congressional delegation of authority to Indian tribes to control liquor sales within their respective reservations is unconstitutional as applied to non-Indians conducting their business on fee patented land within the exterior boundaries of their reservations. This decision is contrary to established authority, as shown by the Government's Petition at pages 15-16. It also creates dangerous no-man's areas within Indian reservations immune from the police power and regulatory jurisdiction of any governmental authority and wreaks havoc with tribal plans for orderly and controlled economic development.

The effect of the decision below cannot be limited to tribal authority over one particular kind of business activity, i.e. liquor sales. If tribes do not have authority to license liquor sales pursuant to a specific Congressional delegation, neither can they zone, or apply building codes, or enforce health, sanitation or environmental requirements, or condemn land, or license utilities, or perform any of the other myriad essential functions of modern government, whether pursuant to their inherent or residual tribal sovereignty,[1] or a specific Congressional delegation of authority.

This Court has noted the difficulties attendent upon "impractical patterns of checkerboard jurisdiction" within Indian reservations and has struggled hard to prevent that result whenever possible. *Seymour* v. *Superintendent,* 368 U.S. 351 at 358 (1962). See also *Mattz* v. *Arnett,* 412 U.S. 481 (1973). If, as Amicus believes, and this Court [2] and the New Mexico Supreme Court [3] have held, states and their political subdivisions are without jurisdiction to regulate the business

[1] See, *e.g.*, Cohen, *Handbook of Indian Law* 122 (1944):

> Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* . . . The statutes of Congress, then, must be examined to determine the limitations on tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty. [emphasis in original]

[2] *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U.S. 685 (1965).

[3] *Sangre De Cristo Dev. Corp., Inc.* v. *City of Santa Fe,* 84 N.M. 343, 503 P.2d 323 (1972), *cert. denied,* 411 U.S. 938 (1973).

activities of non-Indians operating on non-Indian lands within Indian reservations,[4] the decision of the court below means that such activities are immune from any governmental police power regulation whatsoever.

This result is totally out of keeping with the requirements of today's industrialized and highly interrelated society. It is far worse than checkerboard jurisdiction which merely makes the exercise of governmental control more difficult, but, at least in theory, not impossible.

The decision below will also prevent tribes from planning for the orderly and controlled economic development of their reservations. Planning obviously requires centralized control over a fixed geographical area. If the ability to exercise that control depends not upon the location of the land, but upon such factors as whether the land or business are owned by Indians or non-Indians, intelligent planning simply cannot be done. What is within tribal jurisdiction today may be gone tomorrow. Those seeking to avoid regulation and control would have a field day. The enormous gaps in

[4] See also *McClanahan* v. *Arizona Tax Comm'n,* 411 U.S. 164 (1973), decided after *Sangre De Cristo,* in which this Court's previous decisions regarding the limits of permissible state jurisdiction on Indian reservations were clarified and their basis defined more precisely. In particular, footnote 6 of the *McClanahan* opinion states explicitly the tribal sovereignty rationale behind the Supreme Court's earlier *Warren Trading Post* holding:

> The Court invalidated Arizona's tax in part because "Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities." *Warren Trading Post Co.* v. *Arizona Tax Comm'n, supra* at 690.

regulatory authority would, in many instances, preclude any effective regulation. At a minimum, Indians would be restricted while, ironically, non-Indians would enjoy unlimited freedom from governmental control within reservations that cannot be achieved in non-Indian communities outside reservations. Among many other evils, non-Indians would thereby gain unfair competitive advantages.

The statutory scheme pursuant to which the defendants were prosecuted recognized these regulatory and jurisdictional realities by delegating authority to one entity, the Indian tribe that governs the reservation, to license anyone, Indian or non-Indian,[5] who wants to sell liquor within Indian Country, whether located on patented or trust lands.[6] By holding this delegation unconstitutional, the court below has rendered Indian reservations largely uncontrollable and ungovernable. The motion and petition of the United States must be granted to prevent this extremely serious, improper and unjust result.

Respectfully submitted,

ROBERT S. PELCYGER
THOMAS W. FREDERICKS
1506 Broadway
Boulder, Colorado 80302
Counsel for Amicus Curiae

Of Counsel

Native American Rights Fund

January, 1974

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[5] Defendants make no claim of discriminatory enforcement.

[6] There is one sensible exception: sales on fee patented lands in non-Indian communities.

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* The opinion and judgments of the Court of Appeals and the judgment of the District Court are not reprinted in this appendix since they are already printed as an appendix to the petition.

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

[Caption omitted]

1972

DATE	PROCEEDINGS
June 29	Information filed.
	Pltf. precipe for 4 summonses directing defts. to appear July 10, 1972 at 1:00 P.M., filed, and summonses and copies issued.
July 6	Order appointing counsel for Deft. Bonnie Ellen Velasquez, filed.
	Summons with acknowledgment of service by deft. Martin DeWalt Mazurie on July 3, 1972, filed.
	Summons with acknowledgment of service by deft. Margaret J. Mazurie on July 3, 1972, filed.
	Summons with acknowledgment of service by deft. The Blue Bull, Inc. by Margaret J. Mazurie, Pre.-Treasurer on July 3, 1972, filed.
July 10	Deft. Bonnie Ellen Velasquez arraigned, plea of not guilty ent. by deft. to Counts I and II.
	Deft. The Blue Bull, Inc. arraigned, plea of not guilty ent. by deft.
	Deft. Margaret J. Mazurie arraigned, plea of not guilty ent. by deft to Count I.
	Deft. Martin DeWalt Mazurie arraigned, plea of not guilty ent. by deft. to Count I.
	Appearance for defts. Martin Dewalt Mazurie, Margaret J. Mazurie and The Blue Bull, Inc., filed.
	Summons with deft. Velasquez's acknowledgment of same on July 5, 1972, filed.
Aug. 15	4 Waivers of trial by jury by all 4 defts., with consent of D.A., and approval of the Court, filed, copies to counsel.
Aug. 23	Notice setting non-jury trial for Sept. 29, 1972 at 1:30 p.m., filed and copies to counsel.
Sept. 19	Notice resetting non-jury trial for 9-29-72 at 10:30 a.m., filed and copies to counsel.

1972

DATE	PROCEEDINGS
	1 pltf. precipe for subpoena duces tecum, filed, subpoena and copy issued.
	1 pltf. precipe for 4 witness subpoenas, filed, and subpoenas and copies issued.
Sept. 25	Notice resetting trial to the Court for October 12, 1972 at 9:30 A.M., filed, notices to counsel.
Sept. 28	1 pltf. subpoena duces tecum with Marshal's return of service on Sept. 2, 1972, filed.
	4 pltf. witness subpoenas with Marshal's return of service on Sept. 26, 1972, filed.
Oct. 6	Motion for order directing witness subpoenas to issue at government expense filed.
	Order directing witness subpoenas to issued at government expense, filed, & copies to counsel, subpoena & copy issued.
Oct. 10	One deft. subpoena issued.
	Pltf. precipe for 3 witness subpoenas, filed, and subpoenas and copies issued.
Oct. 12	Reporters transcript of proceedings of July 10, 1972, filed.
	3 pltf. and 2 deft. subpoenas, with returns, filed.
	Appearance of Robert M. Seipt as atty. for defts. Martin and Margaret Mazurie and The Blue Bull, Inc., filed.
	Trial to Court commenced and concluded. Matter taken under advisement. Pltf. given to Nov. 8, 1972 to file proposed judgment of conviction; deft. given to Nov. 8, 1972 to file proposed judgment of acquittal.
Oct. 13	Judgment and acquittal as to deft. Velasquez, ent. and filed, and copies to counsel.
Oct. 16	Voucher for counseling services, filed. (as to deft. Velasquez)
Nov. 8	Memorandum of law of the plaintiff, The United States of America, filed.
	Proposed general findings, special findings of fact, and conclusions of law submitted by plaintiff, The United States of America, filed.
Nov. 22	Judgment of conviction with general findings, finding defendants Martin Dewalt Mazurie, Margaret J. Mazurie and The Blue Bull, Inc.,

1972

DATE	PROCEEDINGS
	guilty on Count 1 of the Information herein, ent. and filed, and copies to counsel.
Nov. 27	Notice setting imposition of sentence for Dec. 1, 1972 at 9:30 A.M., filed, copies to counsel.
Dec. 1	Hearing not held.
Dec. 4	Notice of appeal filed by defendants Martin Dewalt Mazurie, Margaret J. Mazurie and The Blue Bull, Inc., and copies mailed by Clerk on December 4, 1972 to attys. Richard V. Thomas, John R. Hursh, Charles E. Hamilton, Robert M. Seipt and to Clerk, U.S. Court of Appeals, Tenth Circuit, Denver, Colo.
	Written consent of deft. Martin Dewalt Mazurie to be sentenced in absentia, filed.
	Written consent of deft. Margaret J. Mazurie to be sentenced in absentia, filed.
	Written consent of deft. The Blue Bull, Inc., by and through its President, Margaret J. Mazurie, to be sentenced in absentia, filed.
	Judgment as to Deft. Martin Dewalt Mazurie: Written consent to be sentenced in absentia accepted by the Court, deft. to pay a fine of $100.00 on Count I of the Information, without costs, ent. and filed, cert. copies to U.S. Marshal.
	Judgment as to deft. Margaret J. Mazurie: Written consent to be sentenced in absentia accepted by the Court, deft. to pay a fine of $100.00 on Count I of the Information, without costs, ent. and filed, cert. copies to U.S. Marshal.
	Judgment as to deft. The Blue Bull, Inc.: Written consent to be sentenced in absentia accepted by the Court, deft. to pay a fine of $100.00 on Count I of the Information, without costs, ent. and filed, cert. copies to U.S. Marshal.
Dec. 8	Defendants' transcript order, filed.
	Reporter's transcript of proceedings of Dec. 4, 1972, filed.

1973

DATE	PROCEEDINGS
Jan. 8	Motion of defendants to extend time to transmit record on appeal, filed.
	Order extending time to and including February 15, 1973 for defts. to transmit the record on appeal, filed, copies to counsel and Clerk, U.S. Court of Appeals, Tenth Circuit, Denver, Colo.
Feb. 5	Reporter's transcript of trial proceedings one volume, filed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, PLAINTIFF, v. MARTIN DEWALT MAZURIE, MARGARET J. MAZURIE, THE BLUE BULL, INC., a corporation, and BONNIE ELLEN VELASQUEZ, DEFENDANTS.	NO. 8570 CRIMINAL. Title 18 U.S.C. Sections 1154 and 2 (Introducing Intoxicants into the Indian Country—Count I; Sale of Intoxicants to an Indian—Count II)

Filed Jun. 29, 1972, A. Marvin Helart, *Clerk*

INFORMATION

The United States Attorney charges that:

COUNT I

On or about June 10, 1972, in the District of Wyoming, on and within the exterior boundaries of the Wind River Indian Reservation and within the Indian Country, MARTIN DEWALT MAZURIE and MARGARET J. MAZURIE and THE BLUE BULL, INC. unlawfully, wilfully and knowingly did introduce and each of them did wilfully cause the others of them unlawfully, wilfully and knowingly to introduce, and each of them did aid and abet and counsel and command and induce and procure the others of them unlawfully, wilfully and knowingly to introduce into the Indian Country malt and spirituous and vinous liquor and beer and ale and wine and ardent and intoxicating liquor.

In violation of Title 18 U.S.C. Sections 1154 and 2.

COUNT II

On or about June 13, 1972, in the District of Wyoming, on and within the exterior boundaries of the Wind River Indian Reservation and within the Indian Country, BONNIE ELLEN VELASQUEZ unlawfully and, wilfully and knowingly did sell and dispose of and exchange and barter to Duwayne Harris, an Indian person, who is a ward of the

Government under charge of an Indian Superintendent and over whom the Government exercises guardianship through its departments, 1 six-pack of Coor's beer in 12 oz. cans.
In violation of Title 18 U.S.C. Section 1154.

/s/ Richard V. Thomas
RICHARD V. THOMAS
United States Attorney
District of Wyoming

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, PLAINTIFF, vs. BONNIE ELLEN VELASQUEZ, ET AL., DEFENDANTS.	No. 8570 Criminal

Filed Oct. 13, 1972, A. Marvin Helart, *Clerk*

JUDGMENT AND ACQUITTAL

The above-entitled cause having come on regularly for trial before the Court, without intervention of a jury, a jury having been waived expressly and in writing by the defendant Bonnie Ellen Velasquez, with the consent of the plaintiff and the approval of the Court, and the matter having been duly tried to the Court and evidence having been adduced for and on behalf of the plaintiff and the defendants herein, and the defendant Bonnie Ellen Velasquez having moved for Judgment of Acquittal, and the Court having heard and considered the arguments of counsel, and the Court being fully advised in the premises DOTH FIND:

That from all of the evidence, facts and circumstances of the case, and the reasonable inferences to be drawn therefrom, that the plaintiff has failed to prove defendant Bonnie Ellen Velasquez's guilt as to the offense charged in Count II of the Information herein beyond a reasonable doubt; NOW, THEREFORE, IT IS

ADJUDGED by the Court that the defendant Bonnie Ellen Velasquez be, and she hereby is, acquitted of the offense charged in Count II of the Information filed herein; it is

ORDERED that the defendant Bonnie Ellen Velasquez be, and she is hereby, discharged.

Dated: October 13, 1972.

Ewing T. Kerr
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Govmts Exhibit No. V
Docket 8570
U.S. District Court
Cheyenne, Wyoming

UNITED STATES OF AMERICA, PLAINTIFF, v. MARTIN DEWALT MAZURIE, MARGARET J. MAZURIE, THE BLUE BULL, INC., a corporation, and BONNIE ELLEN VELASQUEZ, DEFENDANTS.	NO. 8570 CRIMINAL Title 18 USC Section 1154 & 2 (Introducing intoxicants into the Indian Country—Count I; Sale of Intoxicants to an Indian—Count II)

STIPULATION OF PARTIES

It hereby is stipulated by and among the United States of America, and MARTIN DEWALT MAZURIE, MARGARET J. MAZURIE, THE BLUE BULL, INC., a corporation, and BONNIE ELLEN VELASQUEZ that:

1. On February 13, 1971 the Arapahoe General Council of the Arapahoe Tribe adopted Resolution No. 3081, thereby adopting and passing for the tribe Ordinance No. 26, and on February 26, 1971, the Shoshone General Council of the Shoshone Tribe adopted Resolution No. 3081, thereby adopting and passing Ordinance No. 26, all as shown by a copy of Resolution No. 3081 together with Ordinance No. 26 attached hereto as Exhibit I.

2. Ordinance No. 26 was published in the Federal Register as required by Title 18 U.S.C. Section 1161 on Thursday, January 27, 1972 as shown by a copy of the publication attached hereto as Exhibit II.

3. On April 12, 1972 an application for a tribal license to engage in the sale of intoxicating beverages was filed with the Joint Business Council of the Shoshone and Arapahoe Tribes by the Blue Bull, Inc., acting through Margaret J. Mazurie, President of the Blue Bull, Inc., as shown by a certified copy of an extract of the minutes of the Joint

Business Council of the Shoshone and Arapahoe Tribes, attached hereto as Exhibit III.

4. On April 17, 1972, the application of the Blue Bull, Inc., for a tribal license to engage in the sale of intoxicating beverages was denied by the Joint Business Council of the Shoshone and Arapahoe Tribes as shown by a certified copy of an extract of the minutes of the Joint Business Council of the Shoshone and Arapahoe Tribes for that date, attached hereto as Exhibit IV.

5. Archie L. Keep, Special Agency Officer, Wind River Indian Reservation, Wyoming, would testify under oath that on June 10, 1972, he purchased a six pack of Coors beer in 12 ounce cans from Martin Mazurie, the defendant herein, at the Blue Bull Bar for $1.50; that prior to the purchase the beer was in an upright cooler and other cans of Coors beer were evident; that the purchase was made inside the Blue Bull Bar; and that Martin Mazurie stated that he was only selling package liquor and that possibly the bar would be opened up later; and would further testify that on April 3, 1972, he advised Margaret J. Mazurie that if she did not apply for a Tribal liquor license, she would be subjected to a felony charge.

6. Frank Hurtado, Wind River Indian Reservation, Wyoming, would testify under oath that he is an enrolled Shoshone Indian; that he resides in the vicinity of Fort Washakie, Wyoming; that on June 10, 1972, he purchased a six pack of Coors beer in 11 ounce bottles from Martin Mazurie at the Blue Bull Bar for a price of $1.50.

7. Duwayne Harris, Wind River Indian Reservation, Wyoming would testify under oath that he is an enrolled Shoshone Indian; that he resides in the vicinity of Fort Washakie, Wyoming; that on June 13, 1972 he purchased a six pack of Coors beer in 12 ounce cans from Bonnie Ellen Velasquez, the defendant herein, at the Blue Bull Bar for $1.50.

8. Exhibits I, II, III and IV Attached hereto may be received in evidence as Government's Exhibits I, II, III and IV.

9. The Blue Bull Bar is located within the exterior boundaries of the Wind River Indian Reservation, Wyoming, on land owned in fee by the Blue Bull, Inc., a Wyoming corporation.

10. That the Blue Bull, Inc., owns the land in fee simple

as successor in interest from Hazel Large Stewart who obtained a patent from the United States, as shown by defendants' Exhibits "A", "B", and "C" attached hereto.

11. That the defendants and their predecessors in interest are operating under a valid and current retail liquor license issued by the County Commissioners of Fremont County, Wyoming, which liquor license has been issued each year by said County Commissioners from 1954 through 1973 and is still current as shown by a statement of the County Clerk of Fremont County, Wyoming, attached hereto as Exhibit "D".

12. That up until the printing of Ordinance No. 26 in the Federal Register on January 27, 1972, Ordinance No. 398 adopted on November 3, 1953 was in full force and effect, a copy of said ordinance is attached hereto and marked Exhibit "E".

13. That all of the plaintiff's exhibits previously contained herein and all of the defendants' exhibits previously set out herein shall be admitted without objection.

UNITED STATES OF AMERICA

BY: /s/ Richard V. Thomas
RICHARD V. THOMAS
United States Attorney
District of Wyoming
Attorney for the United States of America

MARTIN DEWALT MAZURIE, MARGARET J. MAZURIE and THE BLUE BULL, INC., a Corporation, Defendants

BY: /s/ Charles E. Hamilton
CHARLES E. HAMILTON
Broadway and Park
Riverton, Wyoming 82501
Attorney for said Defendants

BONNIE ELLEN VELASQUEZ, Defendant

BY: /s/ John R. Hursh
JOHN R. HURSH
Post Office Box 328
Cheyenne, Wyoming 82001
Attorney for said Defendant

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF WYOMING

UNITED STATES OF AMERICA
v.
MARTIN DEWALT MAZURIE, ET AL., } No. 8570 Criminal

Filed Dec. 4, 1972, A. Marvin Helart, *Clerk*

On this 4th day of December, 1972 came the attorney for the government and the defendant ~~appeared in person and~~ [1] Martin Dewalt Mazurie not appearing but his written and signed consent to be sentenced in absentia having this day been accepted by the Court and filed herein,

IT IS ADJUDGED that the defendant upon his plea of [2] not guilty and the Judgment of Conviction entered and filed by the Court on Nov. 22, 1972, has been convicted of the offense of Introducing Intoxicants into the Indian Country, in violation of Title 18, Sections 1154 and 2, United States Code, as charged [3] Count I of the Information ~~and the court having asked the defendant whether he has anything to say why judgment should not be pronounced~~, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant ~~is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of~~ [4] pay a fine of $100.00 on Count I of the Information, without costs.

---

[1] Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any

~~It Is Adjudged that~~ [5]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to [6]

Ewing T. Kerr
United States District Judge.

....., *Clerk.*

other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court to recommend a particular institution.

United States District Court
for the
District of Wyoming

United States of America v. Margaret J. Mazurie, et al.	No. 8570 Criminal.

Filed Dec. 4, 1972, A. Marvin Helart, *Clerk*

On this 4th day of December, 1972 came the attorney for the government and ~~the defendant appeared in person and~~ [1] Defendant Margaret J. Mazurie not appearing, but her written and signed consent to be sentenced in absentia having this day been accepted by the Court and filed herein,

It Is Adjudged that the defendant upon ~~his plea of~~ [2] her plea of not guilty and the Judgment of Conviction entered and filed by the Court on Nov. 22, 1972, has been convicted of the offense of Introducing Intoxicants into the Indian Country, in violation of Title 18, Sections 1154 and 2, United States Code, as charged [3] Count I of the Information ~~and the court having asked the defendant whether he has anything to say why judgment should not be pronounced~~, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant ~~is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of~~ [4] pay a fine of $100.00 on Count I of the Information, without costs.

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It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to [6]

Ewing T. Kerr
United States District Judge.

....., *Clerk.*

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[5] Enter any order with respect to suspension and probation.

[6] For use of Court to recommend a particular institution.

United States District Court
for the
District of Wyoming

United States of America v. The Blue Bull, Inc., et al.	No. 8570 Criminal

Filed Dec. 4, 1972, A. Marvin Helart, *Clerk*

On this 4th day of December, 1972 came the attorney for the government and the defendant ~~appeared in person and~~[1] The Blue Bull, Inc., a corporation not appearing, but its written and signed consent to be sentenced in absentia, by its President, Margaret J. Mazurie, having this day been accepted by the Court and filed herein,

It Is Adjudged that the defendant upon ~~his plea of~~[2] its plea of not guilty and the Judgment of Conviction entered and filed by the Court on Nov. 22, 1972, has been convicted of the offense of Introducing Intoxicants into the Indian Country in violation of Title 18, Sections 1154 and 2, United States Code, as charged [3] Count I of the Information ~~and the court having asked the defendant whether he has anything to say why judgment should not be pronounced,~~ and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant ~~is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of~~[4] Pay a fine of $100.00 on Count 1 of the Information, without costs.

[1] Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

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Ewing T. Kerr
United States District Judge.

....., *Clerk.*

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[5] Enter any order with respect to suspension and probation.

[6] For use of Court to recommend a particular institution.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, PLAINTIFF, v. MARTIN DEWALT MAZURIE, MARGARET J. MAZURIE, THE BLUE BULL, INC., a corporation, and BONNIE ELLEN VELASQUEZ, DEFENDANTS.	No. 8570 Criminal

Filed, Dec. 4, 1972, A. Marvin Helart, *Clerk*

NOTICE OF APPEAL

Notice is hereby given that Martin Dewalt Mazurie, Margaret J. Mazurie and The Blue Bull, Inc., defendants above named, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the Judgment of Conviction With General Findings entered in this action on the 22nd day of November, 1972.

DATED this 30th day of November, 1972.

MARTIN DEWALT MAZURIE,
MARGARET J. MAZURIE, and THE
BLUE BULL, INC., a Corporation,
Defendants

BY: CHARLES E. HAMILTON
Broadway and Park
Riverton, Wyoming 82501
/s/ Charles E. Hamilton
Attorney for Defendants

CERTIFICATE OF SERVICE

This is to certify that on this 30th day of November, 1972, I served a copy of the foregoing Notice of Appeal upon the attorney for the Plaintiff by depositing the same in the United States mail, postage prepaid, addressed to said attorney as follows: Mr. Richard V. Thomas, United States Attorney, P.O. Box 668, Cheyenne, Wyoming 82001.

/s/ Charles E. Hamilton
CHARLES E. HAMILTON
Attorney for Defendants
Broadway and Park
Riverton, Wyoming 82501

EXCERPTS FROM TRIAL TRANSCRIPT

[33]

DIRECT EXAMINATION

By MR. THOMAS:

Q. Mr. Rist, it is important really that everyone in the Courtroom be able to hear your testimony, so you might speak a bit more loudly than you usually do, or maybe in your business you speak loudly all the time anyhow. Would you please state your full name?

A. My name is Severt R. Rist.

Q. And where do you live, sir?

A. I live on the Fort Washakie school district campus.

Q. And where is that located, the campus, sir?

A. The school district campus is approximately two miles from the Fort Washakie Indian Agency.

Q. And in which direction, sir?

A. Northwest.

Q. Northwest. Are you employed, Mr. Rist?

A. Yes, I am.

Q. And what is your employment?

A. I'm the superintendent of schools of Fort Washakie School District No. 21.

Q. Could you tell the Court what is encompassed within that school district, Mr. Rist?

A. What is encompassed? You mean in the way of land?

Q. Yes, sir.

A. I can't tell you a definite number of acres. We serve [34] approximately—well, probably most of the Shoshoni Indian area of the Reservation.

Q. All right, sir. I didn't know whether you were familiar with that fact or not. I believe we have other information available that will assist the Court.

As superintendent, Mr. Rist, are you familiar with the enrollment of the school?

A. I am familiar with it through our enrollment forms and in looking at the enrollment forms and knowing what our numbers are, to that extent.

Q. Yes, Now, these are records, I assume, that are kept in the course of the operation of the school district business?

A. Yes, that's right.

Q. And I know that you have recently been asked to look at the enrollment forms; is that correct, sir?

A. Yes.

Q. Mr. Rist, can you tell the Court how many children are enrolled in School District No. 21?

A. At the time we were asked for the enrollment there were 243 students in grades K through 8.

Q. And do your records indicate, Mr. Rist, whether those students are Indian people or non-Indian people?

A. Yes, they do.

Q. Did you determine how many are Indian people?

A. We did from the enrollment records that we have, yes.

[35] Q. And how many were shown on the enrollment record as Indian people?

A. Out of the 243 there were 223 that were shown as belonging to one Indian Tribe or another.

Q. And the remaining twenty would have been shown as what, sir?

A. Some weren't identified and some were shown as white and some were shown as non-Indian.

Q. When you say one Indian Tribe or another, do you recall which Tribes were indicated there?

A. The Shoshoni Tribe is predominant in the school. There are Arapahoes which are probably the second largest group, and then there are scattered numbers of other Indian Tribes represented there, Sioux, Cheyenne, I think there is Hopi, we have Navaho children.

Q. Now, you refer to enrollment cards. Now, how are those cards prepared, Mr. Rist?

A. Well, they are actually not a card. They are an 8½ x 14 sheet.

Q. Yes, sir.

A. These are sent home with the students to be completed by them and their parents and then returned to the school.

Q. And then returned to the school?

A. Yes.

MR. THOMAS: I believe I have no further questions.

[36] THE COURT: How far is your school from The Blue Bull Bar?

A. Approximately two and a half miles, I would say.

CROSS-EXAMINATION

By MR. HAMILTON:

Q. Your name is Rist, R-I-S-T, sir?

A. Yes.

Q. Thank you. You are superintendent of schools for State School District No. 21, aren't you?

A. Yes, I am.

Q. And your salary is paid by the State of Wyoming, isn't it?

A. By the School District 21.

Q. That is a State of Wyoming school district?

A. It is a Fremont County school district. The Board of Trustees are an arm of the State.

Q. O.K. You come under the State Superintendent of Public Instruction?

A. Yes.

Q. All right. Now, the land that the school is situated on, do you know whether or not that is fee-patented land owned by the State?

A. I do not know.

Q. And you say you are two miles from the Governmental Headquarters northwest?

[37] A. Yes.

Q. And you are two and a half miles from The Blue Bull?

A. Approximately that, yes.

Q. And the road between that goes by the school, is that a paved road?

A. Yes.

Q. Is that a County road?

A. I can't tell you that, sir.

Q. O.K.

A. I don't know.

Q. Now, you say that there are 243 students and 20 of them are not Indians?

A. Yes.

Q. Do you know how many of those who purportedly are Indians are enrolled Indians?

A. I wouldn't know the exact number, no.

Q. O.K. Now, do you know whether or not—do you know what the requirement for Indian blood is in order to be an enrolled Indian in the Shoshoni and Arapahoe Tribes?

A. If it hasn't changed, I believe it is still one fourth Indian blood.

Q. From the father's side?

A. I can't answer that.

Q. Do you know?

A. No.

[38] Q. O.K. You don't have any idea then how many of these 223 students of yours are a quarter blood or less, do you?

A. No, I don't.

Q. And if they are a quarter blood or less, then they are not entitled to enrollment, are they?

A. With the Shoshoni or Arapahoe Tribes, I assume they wouldn't be.

THE COURT: I think they are different in different Tribes. I had a lawsuit on that.

MR. HAMILTON: That is the rule on this Reservation, Your Honor. I just wanted to see if he knew.

Q. (By Mr. Hamilton) Therefore they would not be Shoshoni or Arapahoe Tribal members?

A. If they were less then one quarter blood, I assume they would not be.

Q. But you don't have any idea how many of those kids might be? It might be all or half of them? You don't have no idea?

A. I have an educated guess, but that probably wouldn't please the Court, sir.

Q. No, thank you.

How many students—just tell me something, Mr. Rist; about your enrollment out there. Is it going up or down?

A. This is my first year on the job, since August 7, 1972. Looking at past enrollments for the past few years, it looks like [39] it is about a level situation with enrollment, up or down.

Q. About the same. But no drastic changes over the last five years?

A. Not that I know of.

Q. Do you know whether or not—well, let's see, you said your school was a State school. It is a school district under the State Department of Education?

A. Right, public school district.

Q. A public school district. And do you know whether or not the Shoshoni and Arapahoe Tribes or the United States Government contributes any funds for the support of that school, or is it through tax of fee-patented land in that area?

A. The United States Government contributes through Public Law 874 which is in lieu of taxes for impacted areas.

Q. Riverton also gets that, doesn't it?

A. Yes. In addition to that we do have the State and County and school district tax structure that supports the school financially.

Q. Like all over the State?

A. Yes.

Q. Now, those impacted area funds are also available in Riverton and also available in some other communities in the State?

A. Yes, sir. Any Federally impacted area, not necessarily Indian Reservations. Cheyenne is one.

[40] Q. Thank you.

MR. HAMILTON: No further questions.

THE COURT: You are excused, Mr. Rist, if there is no objection.

MR. THOMAS: I think I did want to ask one question.

THE COURT: Very well.

REDIRECT EXAMINATION

By MR. THOMAS:

Q. Did I understand your answer correctly that the only Federal funds you receive are those that you described?

A. We receive other Federal funds in smaller amounts. There are some Johnson O'Malley and there has been Title 3 funds under N.D.E.A.

Q. What are they?

A. National Defense Education Act or something.

Q. All right, sir.

A. They provide for basic areas of learning. They provide matching funds for primarily equipment.

Q. Do you receive any funds to your knowledge from the Bureau of Indian Affairs?

A. We did this past summer to my knowledge through the summer school program. As I understand, there was some

funds both from the Tribe and the Bureau of Indian Affairs that was put into the summer program. I wasn't here, but this is the [41] recollection I have in discussing the program with others.

Q. All right, sir.

MR. HAMILTON: In that case, Your Honor, I object and ask his answer be stricken as hearsay.

THE COURT: Oh, it may stand.

Q. (By Mr. Thomas) I did note that you described your enrollment which I understand K is Kindergarten?

A. Right.

Q. Through 8th grade?

A. Yes.

Q. You do not have in School District 21 a high school?

A. School District 21 is a supporting elementary district and it supports the Lander Valley High School.

Q. Do you know, Mr. Rist, where the high school age students from School District 21 do attend?

A. I would say those that do attend high school, the majority do attend the Lander Valley High School. There are some that attend other high schools on the Reservation and out-of-state.

MR. THOMAS: Yes, sir. I think I have no further questions. I would ask Mr. Rist to be permanently excused.

THE COURT: You may return to your school.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

MR. THOMAS: The next witness would probably be [42] about the same length. I did not know whether the Court would like to take a recess at this time.

THE COURT: We might take a few minutes recess. Court will stand in recess a few minutes.

(WHEREUPON, trial proceedings recessed at 10:45 o'clock a.m., and reconvened at 11:00 o'clock a.m., October 12, 1972.)

MR. THOMAS: Would you, Mr. Reporter, mark this as Government's Exhibit VI and this as VII?

(WHEREUPON, Government's Exhibits VI and VII were marked for identification by the reporter.)

MR. THOMAS: May it please the Court: The Government

would offer at this time Exhibit No. VI which is a description of the boundary of School District No. 21, certified by the Fremont County Assessor, and also Exhibit VII which is a map relating to Exhibit VI from which the school district can be defined, and I believe there is no objection except that on this map there is a legend which shows Shoshoni households and Arapahoe households. The understanding is the Court will not rely upon Exhibit VII for that purpose. It is rather small and probably wouldn't be discernible anyhow.

THE COURT: Very well. The exhibits may be received in evidence.

[43] (WHEREUPON, Government's Exhibits VI and VII were received in evidence.)

MR. THOMAS: Then the Government would call as its next witness Mr. Range.

(Witness sworn.)

EDWARD M. RANGE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. THOMAS:

Q. Mr. Range, it is necessary, of course, that everyone be able to hear you, so you might want to speak more loudly than you do in normal conversation.

Would you state your full name?

A. Edward M. Range.

Q. And where do you live, Mr. Range?

A. At the Wind River Agency, Fort Washakie.

Q. Are you employed, sir?

A. I'm employed by the Bureau of Indian Affairs.

Q. And what is your job?

A. Title is, Housing Development Specialist.

Q. I wonder if you would just tell the Court briefly what you do in connection with that job, Mr. Range?

A. It covers a number of things. We have what we call a [44] home improvement program where we improve Indian homes. This is through Federal grants and welfare money.

We also have some other Federal programs where we work with housing and urban development to provide homes for the people on the Reservation.

Q. All right, sir. In connection with your employment, have you had occasion to make a survey of housing on Wind River Reservation?

A. Yes.

Q. Would you tell the Court what you did in connection with that, sir?

A. We made up, I guess you would call it, an inventory card so that we could record the conditions of housing throughout the Reservation. I personally, with the assistance of people along with me, covered 704 homes on the Reservation, and along with a photograph of each home, we evaluated them as to their living conditions, standard of the home, whether proper heating, plumbing, and so on and also checked as to who lived in these homes, family name and so on.

Q. When did you make this survey?

A. It would be a year ago this past spring in April and May mainly.

Q. April and May of 1971?

A. That would be correct.

Q. All right, sir. I believe that you did prepare a map; [45] is that right, sir?

A. That's correct.

Q. And may I have that, sir?

MR. THOMAS: Would you mark that as Government's Exhibit VIII?

(WHEREUPON, Government's Exhibit VIII was marked for identification by the reporter.)

Q. (By Mr. Thomas) Mr. Range, there has been mounted on the board there what is marked for identification as Government's Exhibit VIII. Do you recognize Government's Exhibit VIII?

A. I do.

Q. And is this something that you prepared?

A. It is.

Q. Would you tell the Court what is shown on Government's Exhibit VIII, Mr. Range?

A. The approximate center of this which shows the pink covered by type is twenty square miles of area. I was asked for the identification of the Indian community.

Q. All right, sir. Now, let me see if I understand. When you say a twenty square mile area, you ran the pink strips along section lines substantially; is that correct?

A. That is correct.

Q. And it is five sections from top to bottom?

A. Correct.

[46] Q. And four sections from right to left?

A. Correct.

Q. Where did you get the map to use for this purpose? Do you know?

A. The map was given to me by Mr. Keep.

Q. All right, sir.

Is Forth Washakie depicted in that map?

A. Yes, sir.

Q. And perhaps you could, if you can reach it with a pointer, it is a little better just to indicate for the Court where Fort Washakie is located.

A. Located right in this section right here. (Indicating.)

Q. All right, sir. Speaking then to the area encompassed in the pink lines. Did the housing survey that you described cover that area?

A. Yes, sir.

Q. Would my understanding be correct that it covered every house, dwelling within the area?

A. No, sir.

Q. Tell me what the fact is, then.

A. The omittance was those between my own knowledge and the knowledge of an individual with me all the time which he deliberately pointed out was not an Indian.

Q. So your survey included only Indian dwellings?

A. Yes, sir.

[47] Q. But with respect to Indian dwellings, it did cover the area enclosed by the pink?

A. That's correct.

Q. Did you determine how many Indian dwellings were in that area?

A. That's correct.

MR. HAMILTON: I'm going to have to object to that as to

the conclusion of Indian dwellings. I don't think proper foundation has been laid for that question.

THE COURT: I think he testified it did include Indian dwellings.

MR. HAMILTON: I think that may be an assumption.

THE COURT: I think we have a general understanding of what——

MR. THOMAS: I believe he earlier testified that he did go through and did check each place where people were living and he asked for a questionaire [sic]; is that right, to be completed?

THE WITNESS: That's correct.

MR. THOMAS: With respect to those places, and what he just said is he did not include in his survey those places which were known to him or one of the people working under him were not inhabited by Indian people.

Q. (By Mr. Thomas) I'm back to my question, then, I believe, Mr. Range, did you determine how many Indian dwellings [48] were within the pink area?

A. No. May I answer?

Q. Yes.

A. It is families.

Q. Yes. How many Indian families?

A. How many Indian families?

Q. All right, sir.

A. We have what we call 170 and ½ Indian families.

Q. I suppose you better tell the Court how you got half an Indian family.

A. We had a family where there was a mixed marriage. We gave half a point to that family as an Indian family. The other half as a non-Indian family.

Q. All right, sir. So you identified again how many Indian families?

A. 170 and ½.

Q. Did you identify non-Indian families?

A. Yes, sir.

Q. How many were there?

A. 41 and ½.

Q. And that encompasses the population within the pink lines on the map?

A. This is correct.

Q. With respect to those dwellings, Mr. Range, you mention where you or someone with you knew it was an non-Indian [49] family. Did you include those in the 40?

A. May I answer in my words?

THE COURT: Go right ahead.

THE WITNESS: The survey, I bypassed the Indian homes, and in the making up of this report for the area, then I went back through maps, through personal interview—not interview, but checking with homes we had bypassed. There again checking things such as the agency, such as the school, which we never covered in our original survey, and checked records there to find the families listed and Indian families and non-Indian families. This is where we come up with the one.

Q. (By Mr. Thomas) That information was included in your non-Indian family list there?

A. Correct.

MR. THOMAS: I believe I have no further questions of Mr. Range at this time.

THE COURT: But your instructions were not to include non-Indians, or shall I say, deeded land to non-Indians? You didn't make a survey?

THE WITNESS: On my original housing survey I bypassed all that were either obvious to me or the person with me which I usually tried to find a resident of that local area to aid me in finding them.

CROSS-EXAMINATION

By MR. HAMILTON:

[50] Q. Mr. Range, you say "Indian families," and what is your criteria for an Indian family?

A. Mainly from the people's statements and from, there again, the individual who happened to be with me who I knew was enrolled.

Q. You don't have any information, though, on how many of those 170 and ½ or one and a half families, you don't have any information in regards to the individuals involved and whether or not they are enrolled, do you?

A. Not with me, no.

Q. And you don't know?

A. Only through working with the enrollments, because I have run, remember, things in regard to looking up families. Every house we work on I have to be checked they are Indian and they are eligible for our program.

Q. This isn't square, is it?

A. No, sir.

Q. Why didn't you make it square and make it as far east of Fort Washakie as you did west? For the record I'm referring to the pink circle or pink square which was—pick rectangle that was previously supposed to depict a twenty mile square area which it doesn't.

A. The idea being that The Blue Bull which falls just about directly on this section line right here, we tried to get an even area and we originally talked about going two miles on [51] either side. The Blue Bull is located approximately in the center of the section line on the north and south. Therefore, rather than go a mile and a half we went two and a half south and two and a half north and three miles east and west.

Q. How many other businesses are in that area of all types? Motels, grocery stores, trading posts. Do you know, sir?

A. It would take me a while to run it in my mind.

Q. If I told you eight would that be pretty accurate?

A. All businesses, whether Indian or non-Indian?

Q. Businesses individually owned and operated businesses.

A. I would say that would be very close, yes, sir.

Q. How many of those eight or nine are operated by Indians? Do you know?

A. My best judgment I would say about three to four are operated by Indians.

Q. Three to four of them are operated by Indians. Can you tell us which those are?

A. It would be J.C. Colson.

Q. J.C. Colson, is he an Indian?

A. Yes, sir.

Q. Is he an enrolled Indian?

A. Not on our Reservation, I don't believe, sir.

Q. O.K. Now, who else?

A. Miss Claremont.

Q. And she is an enrolled Indian?

[52] A. Yes, sir.

Q. Who else?

A. I mentioned Joe Ingaball.

Q. Where is his place of business?

A. He has a station right at the entrance to the agency, a filling station, just outside the actual compound.

Q. Other than those three, then, and the first one is a non-Indian so far as this Tribe and this Reservation is concerned, there are only two, then; is that right?

A. I could not say definitely for sure.

Q. That is your recollection at this time?

A. Right.

Q. The other six or seven are owned by individuals?

A. Yes, sir. One more Indian I can think of, Galexos of the laundromat.

Q. Is he an enrolled Indian in this Reservation?

A. Yes, sir.

Q. But, as I recall your previous testimony, sir, you don't know now out of those 170 and ½ Indian families you testified to how many are actually enrolled Indians?

A. This is correct, enrolled in our Tribe.

Q. Enrolled in these Tribes?

A. Yes.

Q. Which would be subject to the authority of these Tribes. Let me ask you this, Mr. Range? There are highways [53] across the Reservation, aren't there?

A. Yes, sir.

Q. Are those depicted on this map, sir?

A. I believe so.

Q. You pointed out where The Blue Bull was. Maybe you better get your pointer out for the Court again. Would you point that out for me again?

A. Approximately right in this area here.

Q. Right in this area here?

A. Yes.

Q. And the fort is over here?

A. Correct.

Q. So it is about three quarters of a mile to over where The Blue Bull is?

A. Half, three quarters, yes.

Q. Is there a highway—this is the State Highway, 789, isn't it?

A. Yes, sir.

Q. Now, there is a paved road that goes from State Highway 789 past the Fort or the complex or the compound; is that how it is referred to?

A. Yes, sir, agency.

Q. The agency. And it goes on out past The Blue Bull?

A. This is correct.

Q. That is an oiled highway?

[54] A. Correct.

Q. Who owns that?

A. The legality of that I couldn't testify to. This is getting out of my department.

Q. Do you know who maintains it?

A. To the best of my knowledge the County.

Q. Do you know how much land in that twenty section space there is deeded land?

A. No, sir.

Q. Have you ever had an opportunity to check that?

A. No, sir.

Q. Do you know how much of it is individually held trust land?

A. No, sir.

MR. HAMILTON: No further questions.

REDIRECT EXAMINATION

By MR. THOMAS:

Q. Mr. Range, there is one thing I want to be sure I understand. You have a calculation of the number of families which is 211 total; is that right?

A. Add the two figures, that would come out to that, yes.

Q. I had better have you look because I'm not sure I remember.

A. 170 and ½, 41, 212.

Q. What I'm not sure I'm clear on, does that include all

[55] the families within the pink area?

A. This is correct.

Q. It does not include any non-Indian families?

A. No, sir, not to the best of my knowledge.

Q. Because of your survey as these steps you describe, you determined there were 212 families in the pink area?

A. This is correct.

Q. Divided as you have testified?

A. This is correct.

MR. THOMAS: I think I have no further questions.

THE COURT: Any objection to permanently excusing Mr. Range?

(No response.)

THE COURT: You may return to the Reservation when you are ready.

THE WITNESS: Thank you, sir.

(Witness excused.)

MR. THOMAS: I believe at this time, Your Honor, the Government would call Mr. Hobbs.

(Witness sworn.)

CLYDE W. HOBBS,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. THOMAS:

[56] Q. Would you state your full name, sir?

A. Clyde W. Hobbs.

Q. And where do you live, Mr. Hobbs?

A. Presently I live in Lander.

Q. What is your employment, sir?

A. I'm the superintendent of the Reservation, general administrator of the Reservation and programs.

Q. Is that Wind River Indian Reservation?

A. Yes, sir, it is.

Q. How long have you been superintendent at the Wind River Reservation, Mr. Hobbs?

A. Since June, 1961. That would be eleven years and about four months, I guess.

Q. I wonder if you could tell the Court as briefly as pos-

sible what your duties are as superintendent of the Wind River Indian Reservation.

A. Well, cooperation with the Tribe in many of their own programs and administering the various programs of the agency, a final review in most cases of the various programs, law and order, credit, realty, financial, personal financial management of Tribal funds and individual funds on deposit, this sort of administration. There is about eleven or twelve different programs.

Q. Now, do you deal with more than one Tribe, Mr. Hobbs?

A. Yes, I do. I deal with the northern Arapahoe Tribe [57] and Wind River Shoshoni. They own that Reservation jointly.

Q. I believe you were present during the rest of the testimony in the case, were you not?

A. Yes, sir.

Q. So you heard Mr. Rist testify about the school district?

A. Yes.

Q. Are you familiar with that school district, Mr. Hobbs?

A. Well, quite familiar. The district as it exists was set up some, oh, seven or so years before I came there, but I'm quite familiar with the district now.

Q. It was set up before you became superintendent but you have had occasion to work with it since you became superintendent?

A. Yes.

Q. Would you tell the Court how the school district came into existence?

A. With the consent of the residents of that community they asked for the district to be established to take over what had previously been the bureau school. The bureau did run a day school. They asked this be set up.

The bureau held a piece of Tribal land for the administration of that school, and when this was consented a public school district be expanded and set up to serve the whole community, then the Tribe too consented to turning land over to the [58] public school district for the base for where the school set and that sort of thing.

Q. When you speak of the bureau, that is the Bureau of Indian——

A. Yes, I could say the Indian agency is what I'm referring to there.

Q. All right. If I misstate this, correct me. But my understanding was that there was an Indian school operated by the Bureau of Indian Affairs and there was a tract of land set aside for the support of that school?

A. That's correct.

Q. That there came a time when the tract of land with the concurrence of those people living there was committed to School District 21?

A. That is correct.

Q. For the purpose of supporting a public school. Mr Hobbs, do you know what would occur with respect to that tract of land if School District 21 were abolished?

A. Yes.

Mr. Hamilton: Your Honor, I am going to have to object. I think he is calling for a conclusion on the part of the witness. There must be some sort of document or evidence.

The Court: I'll try not to be influenced by it. Do you know?

The Witness: Yes, sir.

[59] The Court: You may answer.

The Witness: The land is being used by the school district in very similar situation as the way the bureau used it. It belonged to the Tribe. When no longer used for the school, then the land reverts back, you know, to the Tribe for whatever use they would make of the land.

Q. (By Mr. Thomas) All right. Mr. Hobbs, with respect to some other Governmental functions, are you familiar with how health services are furnished on Wind River Indian Reservation?

A. Yes, sir.

Q. How are they furnished, sir?

A. Since the early '50s the Department of Health, Education and Welfare, Department of Indian Health, subdivision; prior to that the Bureau of Indian Affairs.

Q. Is this made available to all persons or is it restricted to Indian persons?

A. It is restricted to Indian persons.

Q. Mr. Hobbs, are you familiar with law enforcement functions on Wind River Indian Reservation?

A. Yes, sir. I am in charge of the law enforcement of the Federal Government and Tribe.

Q. Can you tell me how law enforcement is administered?

A. For the crimes other than the major crimes, ten or eleven major crimes, it is administered under CFR Title 25, the secretary's code. It spells out, you know, the Court procedure [60] and so forth, and in this instance, the Judges, three Judges of this Court of Indian Offenses, appointed by the two thirds or more vote of the Council, that is the Court. And there is Court fines that are used to pay the expenses and the Bureau of Indian Affairs then employ policemen, you know, that carry out.——

Q. There are Indian policemen on the Reservation?

A. Yes, sir. There is five.

Q. Mr. Keep also works in law enforcement; is that correct?

A. Yes, he does. Primarily his duties are to the major crimes on the Reservation.

Q. Is my understand [sic] correct there is a series of ordinances adopted which prescribe conduct within the Reservation?

A. Yes, sir, there are.

Q. Is my understanding also corerct that there are some State officers who on occasion perform law enforcement functions on the Reservation?

A. Yes, sir, they do.

Q. How is that accomplished, Mr. Hobbs?

A. As far as the State officers enforcing the laws as pertains to non-Indians, it is the same as any other community. But when they enforce the laws as pertains to Indians, with Shoshoni and Arapahoe or other Indians, so that we understand what we are talking about, we may be talking about Blackfeet or Sioux that live there, then they do this under cross-deputation. [61] The special officer deputizes the County Sheriff's deputies, Highway Patrol, County Sheriffs, Fish and Game personnel. These State and County officials are deputized. Likewise these Indian policemen are deputized to serve as Deputy Sheriffs and so forth and so when the County Sheriff's staff or the Highway Patrol make an arrest, they make the arrest in the name of the Court of Indian Offenses.

Q. Unless it is a white person?

A. Unless it is a white person, yes, sir.

Q. And are there instances when a white person might be arrested in accordance with the authority granted by the Tribal Council?

A. No.

Q. All right, sir. We talked about school, public health, law enforcement. Are there any other Governmental functions that are performed on Wind River Indian Reservation that come to your mind, sir?

A. Well, certainly one of the bigger functions that we have there is administration of land, you know, and leasing, exchanges of land and this sort of thing.

Q. And is that accomplished by the Tribal Councils or by your office or how is it done?

A. Well, generally I would say it would be accomplished by the agency office, by the Bureau of Indian Affairs' office. Most of those require the consent of the Tribe, such as oil and [62] gas leases. The owners of these lands would have to consent to these leases, and predominately the Tribes owns an undivided interest, so it takes the Tribes consent and owners consent to carry out those things.

Q. Do you consult in connection with the management of lands with any Governmental units of the State of Wyoming?

A. No, not Indian land, no.

Q. All right, sir. Does there come to your mind any other Governmental functions you recognize being performed on Wind River Indian Reservation?

A. Well, of course, there is the management of the Wind River irrigation project, the Reservation project. The management of the range. You know, the range administration, similar to what the Bureau of Land Management, similar to the Bureau of Reclamation. We have those, soil and moisture conservation, similar to what the Soil Conservation Service.

Q. Who performs those?

A. The Federal staff of the agency. Many of those are still in cooperation with the Tribe, but to a somewhat lesser extent. But the Tribe, in the management of the range, the Tribe has the range committee and they decide who among

the Indian people will get a certain piece of range to run cattle. Then we administer that contract once it is made.

Q. All right, sir. Any other examples that come to your mind at the moment?

[63] A. Both Tribes operate their own credit program. They put their money into deposit and they have a board of directors similar to a banking procedure that pass on loans and loans are made and collected.

Q. This would be perhaps a business function rather than Governmental?

A. It is a trust function. Yes, sir, it is.

MR. THOMAS: All right. I believe I have no further questions of Mr. Hobbs.

THE COURT: In the course of your duties did you assume any supervisory acts over deeded land owned and occupied by non-Indians within the confines of the Reservation?

THE WITNESS: No, sir, except, you know, as it might pertain to law enforcement. It might be, if it was in the area of the Reservation, especially that diminished portion, then we would. The law and enforcement would act in those cases.

MR. THOMAS: Perhaps an example might be helpful in that regard.

MR. HAMILTON: Just a minute. I think it is going to be leading and suggestive. I am going to object.

THE COURT: I think he answered the question, only as to law enforcement.

THE WITNESS: Yes, sir.

MR. THOMAS: Then I think I have no further questions of Mr. Hobbs at this time, Your Honor.

[64] CROSS-EXAMINATION

By MR. HAMILTON:

Q. Mr. Hobbs, you said you had been there since '61?
A. Yes, sir.
Q. Is Fort Washakie an incorporated town?
A. No, sir.
Q. Are there any boundaries?
A. Yes, of the agency.
Q. There is a boundary?
A. There is a boundary to the agency, but Fort Washakie community, no, sir. There are no boundaries.

Q. So there is no positive way of determining where the community starts and stops, is there?

A. I believe not as it applies to any community, really.

Q. Well, there are no city limits, no corporate limits, no Governmental limits as such which is the town or the community of Fort Washakie, is there?

A. No.

Q. So you who have been the superintendent there for twelve years, more or less, don't know where the Indian community starts and stops so far as Fort Washakie is concerned; isn't that true?

A. That is not true.

Q. Where does it start and where does it stop? Do you know?

[65] A. In the general term, if I'm saying I'm going into the Fort Washakie community, there is an understanding, sir, as to where that community is.

Q. Understanding. Between who and whom?

A. I have never experienced any difficulty with that as I've talked to people about the Fort Washakie community, but there are no boundaries, no, sir.

Q. And there is no accurate way of determining where the edge of that community is, is there?

A. No, there isn't.

Q. All right. I think maybe I could summarize your testimony, Mr. Hobbs, by saying that all of the Governmental functions which are exerted over and benefit the deeded land inside this Reservation, and that is all the red, are performed by the State of Wyoming?

A. Sir, I'm glad you gave me another chance to answer that. I answered the Judge——

Q. O.K.

A. The Bureau of Indian Affairs does build numerous roads on the Reservation. Some of those roads are still maintained in what we might say predominately non-Indian. Others are built in Indian communities have been turned then for maintenance to the County. So there is that function that I overlooked. So there is that function yet of maintenance of roads sometimes in non-Indian communities.

[66] Q. As a matter of fact, all the paved roads in and

around the Governmental agency at Fort Washakie, though, have been turned over and are maintained by the County?

A. That is correct.

Q. At the County's expense?

A. That is correct.

Q. And the school is run by the State of Wyoming?

A. The school?

Q. School district.

A. Run by an elected school board of School District 21.

Q. The school district is one of the school districts of the State of Wyoming, Fremont County, overseen by the State Department of Education?

A. Yes, sir.

Q. Just like any other school district?

A. Like any other public school district.

Q. All right. As a matter of fact the Fremont County Public Health Service has most of the volume of business out in the Fort Washakie area, doesn't it, Mr. Hobbs?

A. No, sir, it doesn't.

Q. The Indian Health Service does?

A. Indian Health Service it is a Federal function. Indian Health Service.

Q. Does it help non-Indians who live on deeded land within the exterior boundaries of that Reservation?

[67] A. No, sir. Once in a while on an emergency they would do it with a charge for that, but not free, no.

Q. Do they do it for non-enrolled Indians?

A. Yes.

Q. They don't differentiate whether or not they are on the Tribal rolls?

A. No, sir.

Q. O.K. Mr. Holbs, this map here—and I hope you can see it, perhaps you would like to come down here and look a minute because it is pretty small——

MR. HAMILTON: Would that be all right, Your Honor?

THE COURT: Yes.

(Discussion off the record.)

MR. HAMILTON: At this time, Your Honor, I would like to move for the admission of Defendants' Exhibit G which is

the map previously discussed showing the entire Reservation.

THE COURT: There being no objection, it may be received in evidence.

MR. THOMAS: Your Honor, I suppose I should make a reservation. I don't think Mr. Keep has had an opportunity to examine it yet, so I do not know whether the areas are accurately marked. It is a map of the Reservation and my understanding is that a good faith effort was made to determine which are fee-lands and which aren't, but from the Government's side [68] we do not know definitively because we haven't compared it with our own map whether those are specifically accurate or not. There might be some minor discrepancies.

THE COURT: Barring the exceptions. I will let you point them out.

(WHEREUPON, Defendants' Exhibit G was received in evidence.)

MR. HAMILTON: Thank you, Your Honor.

Q. (By Mr. Hamilton) Mr. Hobbs, have you had an opportunity to look at this map the last few minutes?

A. Yes, sir, I have.

Q. And are you able to determine the Fort Washakie area from examination of that map?

A. Yes, I can.

Q. And have you noticed the amounts in red which are or the portions which have been marked out in red?

A. Yes.

Q. And these generally would reflect what you know to be deeded land, fee-patented land within that particular area of the Reservation?

A. Well, sir, you've identified them as lands colored in fee, and I realize that there are fee-lands in that Fort Washakie area. I couldn't say I could look at that map and say I know that particular piece of land is in fee, but I know there are several tracts fee there.

[69] Q. As a matter of fact, it would appear that about one third of the land in that area is already fee-patented land, wouldn't it?

A. That would be a matter of opinion. I would think maybe nearer to twenty, twenty five percent.

Q. All right. Now, we have also together examined the legend on the map and it shows the white portions to be trusts individually owned, Indian allotment or tract, and what type of land is that, Mr. Hobbs?

A. That is land by the General Allotment Act and subsequent allotments were given to the individual enrolled members of the Arapahoe and Shoshoni Tribes and held in trust by the United States.

Q. Do these lands yield patents after a certain period of time has elapsed?

A. The patent is issued on those lands subject, first of all, to the request of the owner, and, secondly, to the determination of the bureau as to whether it is in the best interest of the Indian to have a patent.

Q. Yes. But as a general rule these lands will ultimately be patented?

A. I wouldn't say it would be. You know, if I could go on, if we think how long it has been since those lands were allotted and say only twenty, twenty five percent of them are fee today, it would be a slow process, but some lands would be [70] patented, you are correct.

Q. And how many of these lands, just referring to that map, would you estimate, are of that type of ownership at this time?

A. Probably forty or fifty percent of that area is in allotted status, you know, in trust now.

Q. Yes. Now, this is not land which is held by the Tribes and trusts for the Tribes and the benefits of the Tribes, but it is land which has been set out to one particular individual?

A. Correct.

Q. For the benefit of that individual's heirs and ultimately assigns after the patent is issued; isn't that correct?

A. That is correct.

Q. Now, I think in answer to the Court's question you said that the Tribal police do not exert any jurisdiction over non-Indians on fee-patented lands in the Reservation?

A. This is correct.

Q. And you said that they don't, the Indian police, and the Indian Courts there at Fort Washakie does not have any jurisdiction over a white person, was, I think, the way you put it?

A. The police—I would like to clear this up. We are talking about police now as misdemeanors. With major crimes we are talking of another matter.

Q. Well, we are just talking about the Indian Court [71] and Indian police now.

A. Yes, this would then be limited to the minor offenses.

Q. And what is a white person?

A. Well, we don't use the term. I have answered those questions as it was put to me like that. A non-Indian is any person—the laws are based on Indians and non-Indians. They may be black or whatever.

Q. O.K. Let me ask you this, Mr. Hobbs: What is an Indian and what is a non-Indian?

A. An Indian for our records and for our information is anyone on the Reservation that is on any roll anywhere as an Indian.

Q. Only enrolled Indians, everyone else is a non-Indian?

A. That is just a part. The other Indians are those that can prove they are one fourth or more Indian. Generally this is quite a long thing to answer. Those two things will generally answer. Anybody can prove he is a fourth or more or anyone on any Indian Tribal roll, regardless of the degree of Indian blood.

Q. O.K. So that is the two being on a Tribal roll anywhere or being a quarter blood or more?

A. Yes.

Q. How many people live on that Reservation? Do you know?

A. Indians?

Q. I want to know how many people.

[72] A. No. No. We have no reason to know. We have the Bureau of Reclamation project and we take no notice of lives out there.

Q. Well, out of all that area do you know how many enrolled Indians you've got?

A. Total enrollment of the Indians is a little over five thousand. I didn't bring that with me.

Q. That is both Tribes?

A. Yes, sir. They don't all live on the Reservation, however.

Q. How many live on the Reservation?

A. About four thousand of the Shoshoni and Arapahoe and five hundred other than Shoshoni and Arapahoe.

Q. Those would be classified as Indians under your previous definition?

A. Yes, sir, making about forty five hundred.

Q. And how many of that forty five hundred live in that square?

A. I don't know.

Q. Do you have any idea what the population of that area is over and above the forty five hundred qualified Indians?

A. No, sir.

Q. O.K. Now, the fee-patented land that is in that Reservation is subject to taxation by the State of Wyoming, isn't it?

A. Yes, it is.

[73] Q. Now, you say that your agency has to do with the management of the range which is located on the Reservation?

A. Yes, sir.

Q. This is grazing land?

A. Yes, sir.

Q. Doesn't have anything to do with the management of any of that fee-patented land, does it?

A. Yes, sir.

Q. How do you manage the fee-patented land?

A. We may manage it if it lays inside the range unit. Then it is an agreement to graze all that area.

Q. I see. You do that on agreement with the landowner?

A. Yes, uh-huh.

Q. Yes. And you have no jurisdiction as such?

A. No.

Q. Over the fee-patented land located in that Reservation whatever?

A. No, no range jurisdiction whatever.

Q. No jurisdiction of any kind, isn't that true?

A. Would you restate the question?

Q. You have no jurisdiction over any of the fee-patented land located in that Reservation?

A. Are you talking about law enforcement?

Q. I'm talking about any kind of jurisdiction.

A. Yes, sir, we do have.

[74] Q. Over white people?

A. Over land. We were talking of land, I believe.

Q. Now, wait a minute. What kind of criminal jurisdiction law enforcement would you have over land?

A. I asked you if you were talking about law enforcement.

Q. All right, sir. Let's not quibble. Let's see if we can get the answer to the question. As Governmental functions apply to real estate, you have no jurisdiction over any of the deeded land in that Reservation, isn't that so, sir?

A. That is not correct.

Q. All right. What jurisdiction do you have over the land that is deeded in that area?

A. Well, we run an irrigation project is the big one, and if the water is not paid properly, so we can decide which lands would have water delivered to them, and in this case, that was the point that I didn't know—I didn't know what point you were trying to make there. We do run that irrigation project and it applies to fee-land as well as trust land.

Q. Yes. That is because of the nature of the water use?

A. Yes, it is.

Q. Other than that——

A. That is about it. I think that limits it pretty much to that.

Mr. Hamilton: All right. No further question, Mr. Hobbs.

[75] The Court: I think I might have overspoken myself in the early stages of this trial. I have been dealing with the Reservation and I made reference to 360,000 acres. Eliminating deeded land, allotted lands, and just in round numbers, what is your area there for my information? It does not have anything to do with this case.

The Witness: Judge, the outside boundaries of the Reservation, as they exist now, takes in—and I'd like to round this—2,200,000, but with the land taken out of there, it is now reduced to 1,800,000 and there is some acres over that. There is the trust land, 1,800,000, a little over.

The Court: I will stand corrected on my figures.

Redirect examination

By Mr. Thomas:

Q. Mr. Hobbs, we had some discussion which may make this significant, so I will ask you, are you familiar with the

term as applied to Wind River, the ceded portion of the Reservation?

A. Yes, sir, I am.

Q. Could you perhaps just take the marker and indicate for the Court what on the map is encompassed within the ceded portion of the Reservation?

MR. HAMILTON: Your Honor, I am going to have to object to that line of testimony and that line of questioning because that portion which was ceded by the Indians at one time was returned.

[76] MR. THOMAS: But it is still identified as a ceded portion.

THE WITNESS: It is, sir.

MR. HAMILTON: And does not constitute a ceded portion any longer.

THE COURT: Blue Bull is not within the ceded portion?

THE WITNESS: No, it is within the diminished portion.

MR. THOMAS: And I think it would be helpful.

THE COURT: He can go ahead and draw it. I doubt if it has anything to do with the case.

MR. THOMAS: I would suggest to the Court, it is the Government's view there is a sharp difference in jurisdiction between the diminished portion and the ceded portion.

Q. (By Mr. Thomas) In any event, just if you could just briefly show where the diminished portion runs and ceded portion runs.

A. I don't believe, Your Honor, that I could tell exactly, but I can do as well here—I think it covers what we are talking about. When the land was ceded to the United States, it followed the Big Wind River or the Wind River down as you get into this corner. I'm not sure exactly where. Generally on the area we are talking about it followed the Wind River which goes just at the edge of Riverton and then it follows here, so this was the [77] boundary of the diminished portion, and all we see on this map, other than that, I think we could say, if we weren't trying to be too technical, all of this other land north and east, west of the Big Wind River, and then this small portion in here that lays east of Riverton, south and east of the Popo Agie is the ceded portion of the Reservation.

MR. THOMAS: And I suppose we will be alluding to the treaties, Your Honor, that related to that, and how it was defined or at least call the Court's attention to them, but I thought it might be helpful to have that information. I think I have no other questions of Mr. Hobbs at this time.

MR. HAMILTON: I have a couple.

THE COURT: Go right ahead. We will finish him before noon.

MR. HAMILTON: Yes, sir. I have just two.

RECROSS-EXAMINATION

By MR. HAMILTON:

Q. Mr. Hobbs, the ceded portion you are talking about, you are talking about happened in 1905?

A. Yes, sir.

Q. And the Secretary of the Interior restored all remaining surplus lands which were previously ceded; isn't that correct?

A. That's correct.

Q. And therefore the Wind River Indian Reservation, with the exception of these lands which are shown as deeded, were all [78] within the Reservation at this time and has been since 1934, isn't that so?

A. When we use the term "within the exterior boundaries," that is what we are talking about.

Q. The whole thing?

A. That's right.

Q. There is no longer such a thing as ceded or diminished portion of that Reservation because it is all under the authority, whatever authority you have?

A. We have different laws.

Q. Of the Bureau of Indian Affairs?

A. It is, but there are different laws for leasing of oil and gas, different——

Q. All we are concerned about is——

A. No, but when you said "all alike," there may be others. I wanted to only stick to the others. There is different laws.

Q. But the ceded portion has been returned?

A. Yes, it has.

Q. O.K. So we are not concerned with a ceded portion any longer?
A. No, sir.

MR. HAMILTON: O.K. No further questions.
THE COURT: You are excused.

(Witness excused.)

THE COURT: Court will stand in recess until 1:45.
[79] (WHEREUPON, trial proceedings recessed at 12:00 noon, and reconvened at 1:45 o'clock p.m., October 12, 1972.)
MR. THOMAS: May it please the Court: The United States would call at this time Mr. Miller.

(Witness sworn.)

JESSEE F. MILLER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. THOMAS:

Q. As I have suggested to other witnesses, Mr. Miller, you may wish to speak a little more loudly than you usually do because it is necessary for all to be able to hear your testimony.
Would you state your full name for the record, please?
A. Jessee F. Miller.
Q. And where do you live, sir?
A. Arapahoe, Wyoming.
Q. Are you an Indian person, Mr. Miller?
A. Yes.
Q. And what Tribe, sir?
A. Arapahoe.
Q. Do you have any position on the Tribal Council, sir?
A. Yes. I'm the chairman of the Arapahoe Business Council.
[80] Q. In that capacity do you also serve as chairman of general meetings of the Tribe?
A. Sometimes.
Q. Yes, sir. What is your age, Mr. Miller?
A. 52.

Q. And how long have you lived on Wind River Indian Reservation?
A. My entire life.
Q. All your life. Could you tell the Court how close your home is to Fort Washakie?
A. About 30 miles.
Q. Do you have occasion to go to Fort Washakie?
A. Yes.
Q. And could you tell the Court about how often?
A. About twice a week.
Q. Are you familiar with the vicinity of Fort Washakie and the people who live there?
A. Yes.
Q. Do you have any knowledge as to whether that is or is not an Indian community there?

MR. HAMILTON: Objection. That calls for a conclusion on the part of the witness.
THE COURT: I will let him answer.
THE WITNESS: In my opinion, yes, I would say it is an Indian community.
[81] MR. THOMAS: I think I have no further questions of this witness, Your Honor.

CROSS-EXAMINATION

By MR. HAMILTON:

Q. You live about 30 miles east of Fort Washakie, don't you, Jessee?
A. Yes.
Q. You live in the surrounds of the Arapahoe post office?
A. I live about 4 miles from there north.
Q. I see. Well, does the Indian community, where does the Indian community at Fort Washakie stop?
A. I don't believe I could answer that.
Q. Where does it start?
A. I wouldn't know.
Q. So you don't know where the community starts or stops?
A. No. There is no boundary lines.
Q. All right. And there would be no way anyone could really tell where the community starts or stops?

A. No. Just judge by the people that live there, the majority, maybe.

Q. Do you know a man named Wilkinson who is a lawyer in Washington, D.C.?

A. Yes.

Q. He is the general counsel for Arapahoe Tribes, isn't he?

A. Yes.

[82] Q. Do you remember getting a letter from him on July 10, 1972—no—yes. I hand you what purports to be a letter written to you, Jessee, and it is a lousy copy, so you want to look at it pretty close, especially that portion I have underlined in red. Can you read it?

A. No, I can't read it.

THE COURT: Can you identify it? Then you read it for the record.

MR. THOMAS: Might I have a chance to examine it first?

THE COURT: I thought you had a copy. Let Mr. Thomas see it and maybe we can stipulate as to its admissibility even though it is not legible.

MR. HAMILTON: All right, Your Honor. It is a lousy copy.

MR. THOMAS: Your Honor, I would object to the information in this letter for two reasons. I think it is hearsay as far as this witness is concerned, and, furthermore, it would appear to state the conclusions of the writer as to the law applicable to a particular situation which I do not think is relevant or material in this case.

THE COURT: I will try not to be influenced by it. It may be received in evidence or you may read it in the record or that portion which is material.

MR. HAMILTON: Thank you, Your Honor. Would you [83] like to mark this?

(WHEREUPON, Defendants' Exhibit H was marked for identification by the reporter and received in evidence.)

MR. HAMILTON: The portion which is germane, so far as the defense is concerned, Your Honor, states in the second paragraph, "States normally do not exercise any jurisdiction within the exterior boundaries of an Indian Reservation without the express authority of Congress. States have jurisdiction over non-Indians within a Reservation and

where Congress has permitted land to enter fee status, the State has jurisdiction over the fee-land."

And this is from Glen A. Wilkinson who has, for a number of years, been general counsel to the Arapahoe Tribe in Washington, D.C.; is that correct?

THE WITNESS: Yes.

THE COURT: Wilkinson?

THE WITNESS: Yes, Wilkinson.

THE COURT: I think I knew that anyway, but for the records it is all right to introduce it.

MR. HAMILTON: Thank you. I have no other questions.

MR. THOMAS: I would like perhaps to have him available, Your Honor, until the end of the trial.

[84] THE COURT: Very well. You are excused, Mr. Miller.

(Witness excused.)

MR. THOMAS: And now the United States would call Mr. Harris.

(Witness sworn.)

ROBERT HARRIS, SR.,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. THOMAS:

Q. And as I have with other witnesses, Mr. Harris, I would like to suggest that perhaps you speak a bit more loudly than you usually do so all can hear your testimony.

I would like for you to state your name.

A. Robert Harris, Senior.

Q. Where do you live?

A. Sixteen miles north of Fort Washakie.

Q. Is that on the Wind River Indian Reservation?

A. Yes, sir.

Q. Are you an Indian person, Mr. Harris.

A. Yes, sir.

Q. And which Tribe?

A. Shoshoni.

Q. How old are you?

A. 59.

[85] Q. And how long have you lived on Wind River Indian Reservation?

A. All my life with the exception of four years.

Q. Where did you live those four years?

A. In school.

Q. Do you have any position or job with the Tribal Council, sir?

A. I'm chairman of the Shoshoni Business Council.

Q. And in that capacity do you also preside at general Tribal meetings?

A. Whenever elected I do.

Q. Is my understanding correct that at the general Tribal meetings they elect a chairman at each meeting; is that correct?

A. Yes, sir. At General Council meetings the chairman is elected from the body.

Q. I don't know whether the Court and counsel are familiar with this, but at the General Council meetings all adult enrolled members are entitled to participate; is that correct, sir?

A. Yes, sir.

Q. And the ordinance that is the subject matter of this lawsuit which, so I don't misspeak myself, Ordinance 26, No. 3081, was adopted at a General Council meeting of the Shoshoni Tribe; is that correct?

A. Yes, sir.

Q. And if my recollection does serve me, you were assigned [86] as chairman, you chaired that particular meeting?

A. Yes, sir. I was chairman during that General Council meeting.

Q. Mr. Harris, are you familiar with the Fort Washakie community and the surrounding area?

A. Yes, sir.

Q. How often do you have occasion to be there?

A. Oh, as high as three and four times a week.

Q. You know the people who live in that vicinity?

A. Yes, sir.

Q. Do you know, sir, whether it is an Indian community or not?

MR. HAMILTON: Again, I object, Your Honor, on the basis of asking for a conclusion on the part of the witness without proper foundation.

THE COURT: You may answer.

THE WITNESS: I would say, sir, it is Indian Country.

Q. (By Mr. Thomas) All right. I guess I would go back to my other question. I think you indicated you know whether it is an Indian community. What is your answer as to whether it is an Indian community or not?

MR. HAMILTON: Objection. It has been asked and answered.

THE COURT: He may answer again. Go ahead.

[87] THE WITNESS: I was merely confused as to whether you were talking about Indian Country——

Q. (By Mr. Thomas) "Indian Country" is a legal term.

A. I would say it is not a community in the sense of a white community or anything else. This is related as Indian Country, no boundaries.

Q. All right, sir. If my recollection serves me, you were present at the meetings of the council relating to the liquor license for The Blue Bull; is that correct?

A. Yes, sir.

Q. And is it correct that there were two meetings?

A. I chaired the meetings, both meetings.

Q. And would you tell the Court whether there were any reasons for denial of the license to The Blue Bull?

A. The reason——

MR. HAMILTON: I object. The record speaks for itself. It is a record in the Court. Is that the minutes?

MR. THOMAS: The minutes of a dialogue with them, Your Honor. Mr. Harris was present and chaired the meeting.

THE COURT: I will let him testify as to what happened. You can tell us what happened.

THE WITNESS: Well, a public hearing was held. There was—I don't recall the number of people that came to protest the issuance of the license. The one requesting the license was present and also attended those hearings with a [88] chance to state their views.

From the result of those protests issued at that meeting and because of protests other than those, the Business Council saw fit to deny the license.

MR. THOMAS: All right, sir.

THE COURT: Have you ever granted them a license before, Mr. Harris?

THE WITNESS: No, sir.

Q. (By Mr. Thomas) An application had been submitted to the Tribal Councils; is that correct?

A. Yes, sir. An application was submitted, I think, about a week prior to the hearing. I'm not sure about that.

Q. Now, there is one point which you may have information about and you may not, Mr. Harris. Ordinance No. 26 provides in Section 4f that in connection with the application there should be payment of a fee of not less than $300.00 nor more than $1,500.00 per annum. Are you familiar with that requirement?

A. Yes, sir.

Q. Do you know what fee was required in connection with the application for Blue Bull?

A. There was no fee mentioned because the license, if a license would have been granted, a fee would have been set. In this case the license wasn't granted. I don't recall any mention of any fee whatsoever.

Q. You don't know what the fee would have been for the [89] license to The Blue Bull?

A. No, sir, I don't.

Q. Is my understanding correct, Mr. Harris, that you have been involved for a number of years in the Tribal Council, the Business Council and so forth?

A. Yes, sir.

Q. And could you perhaps give the Court a concise statement of the matters that are the concern of your Tribal Council and your Business Council when you meet?

MR. HAMILTON: I object, Your Honor. It is incompetent, irrelevant and immaterial to the purposes of this hearing.

THE COURT: I doubt if it is material. How many attended this General Council meeting, Mr. Harris? Do you recall, approximately?

THE WITNESS: I think the attest there shows the number voting.

MR. THOMAS: The attestation does include that information, Your Honor. Since you ask the certification says that, "We hereby certify that on February 26, 1971, and February 13, 1971, the Shoshoni and Arapahoe Indian Tribes in

General Council duly called and assembled at Fort Washakie, Wyoming, and Arapahoe, Wyoming, attended by approximately 225 adult members of the Shoshoni Tribe and by approximately 300 adult members of the Arapahoe Tribe, constituting a representative [90] portion of the membership, adopted the foregoing resolution and Ordinance No. 26 by a vote of 144 for and 0 against (Shoshoni Tribal members) and a vote of 109 for and 0 against (Arapahoe Tribal members)."

That is what it says, Your Honor.

Q. (By Mr. Thomas) Well, Mr. Harris, let me ask you this: Is it part of the business of the council to manage the affairs of the Wind River Reservation for the Tribes?

A. Yes, sir.

Q. In connection with that, do you ever deal with business activities on the Wind River Indian Reservation?

A. All business transactions that involve the Tribe, we do.

Q. How about the private businesses of other persons?

A. No, sir.

Q. You do not concern yourself with those?

A. No.

Q. Are you familiar with the requirement for a trader's license?

A. Yes.

Q. Does the council have anything to do with trader's licenses?

A. No, sir. That is a regulation of the Secretary and enforced by the Secretary.

Q. And so the Tribes do not enter into that?

[91] A. No, sir.

MR. THOMAS: I believe I have no further questions of Mr. Harris.

THE COURT: You have been on the council a long time, I believe, have you not, Mr. Harris?

THE WITNESS: Yes.

MR. HAMILTON: Could I have a moment, Your Honor?

THE COURT: Yes.

Do you ever concern yourself as a member of the Tribal Council with businesses located on fee-land, privately owned land?

THE WITNESS: No, sir. Most of those operate their own

businesses. The Business Council is charged to confine themselves to Tribal business and not individual business.

THE COURT: That is the way I understood it.

CROSS-EXAMINATION

By MR. HAMILTON:

Q. Mr. Harris, I heard some testimony from the superintendent to the effect that there are about 4,500 Shoshoni—enrolled Shoshoni and Arapahoe enrolled Indians in the confines of Exhibit G which is the big map there; is that right, or is that close.

A. Yes, that is approximately.

Q. O.K. Now, since you've been on the council for the Shoshoni for so long, can you tell me how many other people live [92] there?

A. Other than enrolled members of the Tribe?

Q. Yes.

A. I don't know. I don't believe I could. I could probably make a pretty wild guess, but I wouldn't have any way of knowing.

Q. A lot more than 4,500?

A. On the Reservation?

Q. Yes.

A. I doubt that.

Q. You don't think there are more than—you don't think there are more non-Indians in that area then there are Indians?

A. No, sir, I do not.

Q. Well, actually the city of Riverton is in that area?

A. The city of Riverton is on a ceded portion of the Reservation.

Q. But it is on this map, isn't it?

A. Yes, sir.

Q. And that map is the exterior boundaries of the Reservation?

A. Yes, sir.

Q. And just because someone has gone out and counted Indian families doesn't mean that all of the members of that family are enrolled Indians, does it, Mr. Harris?

A. I can only assume they might be.

[93] Q. Might or might not be, isn't that so?

A. That's right.

Q. And if they are not enrolled Indians, then they are

non-Indians so far as the Tribal jurisdiction is concerned; isn't that correct?

A. Tribal jurisdiction, yes.

Q. Now, why is it, Mr. Harris, that when you have a general meeting—let me ask you this, first: How many enrolled Shoshonis are there?

A. Approximately 2,100.

Q. How many enrolled Arapahoes are there?

A. I don't know.

Q. O.K.

A. I'm not an Arapahoe.

Q. I know you are not. Do you know about, approximate?

A. Approximately 2,800.

Q. Now, back to my former question. Out of 2,100 Arapahoes and Shoshonis, there were only 225 adult members at this meeting according to the certification on this ordinance?

A. Yes, sir.

Q. Which is ten percent?

A. Yes, sir.

Q. And out of 2,800 Arapahoes, according to this certification, there were 300; is that correct?

A. That is what the assertion says.

[94] Q. And out of that, out of the 225 Shoshonis, only 144 voted for your Ordinance No. 26?

A. Yes, sir.

Q. And only 109 of the Arapahoes out of 300?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Which, if my addition serves me right, is less than fifty percent of those who were there voted for it; is that correct?

A. I can only say what the attest there shows.

Q. O.K. The certification says 525 total and only 253 of them voted for this ordinance; right?

A. Yes.

Q. O.K. How many businesses operate within a five miles area of the Government compound at Fort Washakie? Do you know?

A. I'd say in the neighborhood of five. I'm not too sure.

Q. How many of those are operated by enrolled Indians?

A. Two of them, I think.

Q. Two. Are there other businesses located on the Reservation outside of that five mile radius?

A. Yes.

Q. And are most of them almost without exception operated by non-Indians?

[95] A. Not entirely.

Q. Well, how about a figure of ninety percent? Are ninety percent of them operated by non-Indians?

A. No, sir, I wouldn't say that.

Q. What percentage would you say?

A. I would say there is about a fifty percent.

Q. Where are those businesses located?

A. At the Ethete center.

Q. Where is the Ethete center?

A. At Ethete.

Q. That would be here?

A. Yes, sir.

Q. And how far away is that from Fort Washakie?

A. I think it is approximately six miles. I'm not too sure.

Q. And that is an Indian community or are you sure of that?

A. No, sir, I'm not sure of that.

Q. O.K. And the Tribe really has no jurisdiction over non-Indians?

A. No, sir.

MR. HAMILTON: No further questions.

REDIRECT EXAMINATION

By MR. THOMAS:

Q. Mr. Harris, Mr. Hamilton examined you about numbers and so forth. Was the number that is shown on the certification [96] enough to adopt that ordinance for the Tribe?

A. Yes, sir. That is a representative number.

Q. And how is the representative number defined?

A. There is no constitution in the by-laws of either one of these Tribes, so a duly called meeting, actually there would be no restraint if there was only ten people if they go ahead and decided to do it. This doesn't operate this way because there wouldn't be much sense. It could be overturned the next time. So they more or less assume what is a representative number.

Q. And proceed to adopt legislation in that fashion?

A. Yes, sir.

Q. Is it correct that the General Council is a legislative body?

A. Yes, sir, in a sense they are.

Q. And this would be in your instance a legislative body of the Shoshoni Tribe?

A. Yes.

Q. You say there is no constitution or by-laws, however.

A. No, sir.

Q. So the authority to legislate is derived in what fashion, Mr. Harris?

A. It is arrived through the General Council with a mandated instruction to the Business Council.

Q. Yes. But I'm speaking of the authority of the General

[97] Council to legislate.

A. They are the people. They are the Tribe.

Q. And this is what their authority is?

A. Yes.

Q. Now, Mr. Hamilton asked you about the town of Riverton and so forth and you told him that it was on the map but it was on the ceded portion; is that correct, sir?

A. Yes, sir.

Q. And you seem to be making a distinction between the ceded portion and some other unit. Could you tell the Court what that was, sir?

A. I make that distinction because of the late decision of the Supreme Court of the State of Wyoming.

Q. Is that the Moss case that you have in mind?

A. Yes, sir.

Q. And so you recognize a ceded portion. What else do you recognize on the Reservation, sir?

A. There is the reclamation area of the Reservation.

Q. Is that a part of the ceded portion?

A. Yes, sir. That is on the north side of the Wind River.

Q. What do you call the area south of the Wind River?

A. The diminished portion of the Reservation.

Q. And I believe you said that you live sixty miles north. Do you live on the diminished portion?

A. No, sir. I live on the ceded portion.

[98] MR. THOMAS: You live on the ceded portion. I believe I have no further questions.

THE COURT: You are excused, Mr. Harris.

MR. HAMILTON: I wonder if I can ask him a couple questions.

THE COURT: You may if they are material.

RECROSS-EXAMINATION

By MR. HAMILTON:

Q. Mr. Thomas went through what you call the diminished and ceded portions——

THE COURT: Are we dealing here with deeded and fee-lands, not diminished or ceded land? I do not know why we are bringing this up. I'm going to decide this on the question of fee-land.

MR. THOMAS: May I make a comment? Since you raised the question, Your Honor, the position of the Government very simply is that the case law does recognize a distinction between what would be the ceded portion and diminished portion, and upon that distinction depends on the status of the fee and Indian owned lands.

THE COURT: The question is of fee-land here.

MR. THOMAS: Well, what the Government will be arguing here, if an area is identified as Indian Country, then even the fee-land in that area is part of the Indian Country, even though title may have passed out of an Indian person.

[99] THE COURT: Very well.

Q. (By Mr. Hamilton) Mr. Harris——

THE COURT: I will take judicial notice of the fact all this country here is Indian Country and is so defined and has been for the last hundred years.

MR. HAMILTON: At least since Judge Pickett, Your Honor, handed down the Hildebrand decision.

THE COURT: Yes.

Q. (By Mr. Hamilton) Mr. Harris, are you familiar with all of these plain white tracts in through here which constitute about fifty percent of this whole area, indicating the land around Fort Washakie on east to Riverton?

A. Am I familiar with each individual tract?

Q. Are you familiar with generally what the white designation is in here?

A. I don't know what the white designation is. I can't see the legend.

Q. Well, the legend says, "trust, individually owned Indian allotment or tract."

A. Oh, yes.

Q. And isn't it true, Mr. Harris, that these lands will, in the course of time, under normal circumstances, be fee-patented lands?

A. No, sir, not under normal circumstances.

Q. Sir?

[100] A. No, sir. I do not agree with that. Not under normal circumstances.

Q. What will they do?

A. It would have to be under Acts of Congress or such things to force patent fees upon the people.

Q. Well, the patent that was issued in this case was issued in 1954?

A. Yes, sir.

Q. And it was from originally what was trust, individually owned Indian allotment or a tract?

A. Yes, sir.

Q. And most of the patents which have been issued in that area have been under that particular Act of Congress, have they not?

A. Yes, sir.

Q. And are you aware, sir, of the fact that that Act of Congress states that when those lands are so patented they come under the civil and criminal jurisdiction of the State or territory?

A. Yes, sir, I'm aware of that.

Q. And therefore I suppose that is accountable for your testimony that the Tribes have no jurisdiction over such lands?

A. That's correct.

MR. HAMILTON: No further questions.

THE COURT: You are excused, Mr. Harris.

[101] (Witness excused.)

MR. THOMAS: And the Government at this time would call Mr. Keep, Your Honor.

Your Honor, I might just briefly preface Mr. Keep's testimony by calling the Court's attention to paragraph five of the stipulation which was designed to capsulize his testimony about the purchase of the Coors beer. In the process of exchanging a stipulation, a phrase was added at the end, "and would further testify that on April 3, 1972, he advised

Margaret J. Mazurie that if she did not apply for a Tribal liquor license, she would be subjected to a felony charge."

I entered into the stipulation, but Mr. Keep then explained to me he was not sure that was a completely fair statement of what occurred, and I thought that it was perhaps best to give him a chance to explain that particular portion of the stipulation.

THE COURT: Very well.

(Witness sworn.)

ARCHIE L. KEEP,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. THOMAS:

Q. And I would just ask you to tell the Court what happened as you recall it, Mr. Keep.

[102] A. I believe there was a telephone conversation with Mrs. Mazurie. I could have stated to her it was a felony charge, but I know better for the fact is the first time it is a misdeamor [sic]. The second time is a felony. Like I say, there is a possibility that I did say this to her.

Q. You would agree that you did discuss the fact there would be a criminal violation?

A. Yes.

Q. If there was no application for license?

A. I can't remember whether I phoned her or she phoned me, one of the two, and there was a conversation as to the procedures to go through to obtain a Tribal liquor license, and this is the consequences.

Q. All right, sir. Now, just to complete the record, would you state your full name?

A. My name is Archie L. Keep.

Q. And where do you live?

A. Fort Washakie, Wyoming.

Q. Is that on the Wind River Indian Reservation?

A. Yes, sir.

Q. And are you employed?

A. Yes, sir. I'm employed by the Bureau of Indian Affairs as a supervisor criminal investigator.

Q. And how long have you been so employed at Wind River?

A. It will be three years this coming February—June, I'm [103] sorry.

Q. Three years in June of '73?

A. Yes.

Q. So something more than two years as of this time?

A. Yes, sir.

MR. THOMAS: I believe I have no further questions of Mr. Keep, Your Honor.

THE COURT: You made the purchase to be used as evidence in the case?

THE WITNESS: Yes, sir.

THE COURT: They knew who you were when you purchased?

THE WITNESS: Yes, sir.

CROSS-EXAMINATION

By MR. HAMILTON:

Q. You are employed by the Bureau of Indian Affairs?

A. Yes, I am.

Q. And you thereby get your authority through the United States Government?

A. Correct.

Q. And the United States Government does not assert any authority over non-Indians on deeded land within the exterior boundaries of the Reservation, does it?

A. No, sir.

MR. HAMILTON: No further questions.

[104] THE COURT: You are excused, Mr. Keep.

(Witness excused.)

MR. THOMAS: Your Honor, I believe there have been marked and received in evidence as of this time Government's Exhibits, all Roman numerals, I, II, III, IV, V, VI, VII and VIII. In the event I have inadvertently overlooked offering any of those, I would reoffer them.

THE COURT: If any have been overlooked, they may be received in evidence.

MR. THOMAS: And the Government would rest at this time.

THE COURT: Government rests.

MR. HAMILTON: Your Honor, I wonder if we could have

a few minutes recess so we can discuss what we are going to do.

THE COURT: Very well. Court will stand in recess a few minutes.

(WHEREUPON, trial proceedings recessed at 2:30 o'clock p.m., and reconvened at 2:45 o'clock p.m., October 12, 1972.)

MR. HAMILTON: Your Honor, at this time I would like to move the Court for an order dismissing this action or a finding of not guilty for the failure of the prosecution to find a violation of Title 18, United States Code, Section 1154 [105] beyond a reasonable doubt. The statute reads under the definition——

THE COURT: I have read it twice.

MR. HAMILTON: All right. It is our contention that the United States has failed to prove beyond a reasonable doubt any violation of this ordinance because they have failed to prove beyond a doubt that my clients are operating in an Indian community.

Now, the original patent from which my clients got their title, Your Honor, says that the United States of America grants this to these people to have and to hold, together with all rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever.

There is no restrictions, no reservations of any sort.

Now, Article 21, Section 26——

THE COURT: What I am going to do, I am going to take this under advisement and tell you people what to do. I will treat your motion as a motion for judgment of acquittal and let you put on your evidence. Then I will instruct the lawyers as to what I want.

MR. HAMILTON: All right, sir. I'll wait then and put this on you a little later.

THE COURT: Then you won't have to do it twice.

MR. HAMILTON: All right.

I would like to call as the first witness Martin Mazurie.

[106] (Witness sworn.)

MARTIN DEWALT MAZURIE,

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. HAMILTON:

Q. Will you please state your name?

A. Martin Dewalt Mazurie.

Q. Where do you live, Mr. Mazurie?

A. I live 580 Fremont Street, Lander, Wyoming.

Q. Does your wife own The Blue Bull, Inc.?

A. Yes, she does, sir.

Q. And where is this? Is this a retail liquor outlet?

A. Yes, it is.

Q. How long has that business been a retail liquor outlet?

A. Since 1954.

Q. And how long have you owned it?

A. I've owned it for three years, three and a half.

Q. And what is the state of title to that land?

A. It is deeded land.

Q. It is not—are there any restrictions or anything else in the deed?

A. No, there is not.

Q. Is your State liquor license current?

A. Yes, sir.

[107] Q. And when does it expire next?

A. April 3, 1973.

Q. And has there ever been a protest rendered by the Tribe against the issuance of your liquor license?

A. No, sir.

Q. Are your situated on what kind of a road?

A. I'm situated on a County road.

Q. And it is a paved road?

A. Yes, sir.

Q. How far away from the Government compound is your place of business?

A. Approximately three quarters of a mile.

Q. How much money do you have invested in that property, sir?

A. Approximately $65,000.00.

Q. And how long has it been since you have been able to earn any money from that?

A. Since April 3, 1972.

Q. Have you had any of your goods confiscated?

A. Yes, sir.
Q. And when was that?
A. Let's see. I can't remember the exact date. I'd have to look it up.
Q. And what did that confiscation entail?
A. I was gone at the time. My wife was tending bar there
[108] and Mr. Keep and Mr.——

MR. THOMAS: Did I understand you weren't present at that time?
THE WITNESS: Yes.
THE COURT: Your wife is here?
THE WITNESS: Yes. I came in right at the middle of it.
MR. THOMAS: I see. O.K.

Q. (By Mr. Hamilton) O.K.
A. Mr. Keep and Mr. King and Mr. Caturia was sent by the superintendent, by the superintendent of the agency, Clyde Hobbs, and came into the bar without a warrant to confiscate the liquor and the spirits and walked into the bar and just took over the establishment and had a Government vehicle there and loaded out the entire stock that was left.
Q. Did they have—you said they had no warrant?
A. They had no warrant for confiscation.
Q. Did they have a Court order of any sort?
A. No, sir.
Q. Did they show you any documents of any kind?
A. Mr. Keep had a Federal book, and when I got there why I read it. He showed it to me.

MR. HAMILTON: No further questions.

CROSS EXAMINATION

By MR. THOMAS:

[109] Q. I believe you said that your wife owns The Blue Bull, Inc.; is that right?
A. Yes, sir.
Q. When you say that, you mean she owns the stock?
A. Yes, sir. She is the president of the corporation.
Q. Do you own any stock?
A. No, sir.
Q. Why don't you own any stock, Mr. Mazurie?

A. Because I was the city councilman for the city of Lander and under the Wyoming State law it says that a councilman cannot own a liquor license.
Q. And so you didn't even own stock in the corporation which had the license?
A. No, sir.
Q. And when you say you've owned it since about 1968 this really would refer to your wife; is that right?
A. No, sir. Yes, sir. Yes, sir. That's right.
Q. Now, I say about 1968. You said about three and a half years. I was doing some figuring. Is '68 about right?
A. Yes, it is.
Q. Did you buy it about the time of the liquor license expiration?
A. We brought it out of an estate, and it was a transfer by the County Commissions and then renewed into my wife's name.
Q. I guess what I was getting at, does your wife's
[110] ownership date from about the April 3rd date?
A. Yes, sir.
Q. You say this is deeded land and my understanding is The Blue Bull owns that land; is that right, sir?
A. Yes, sir.
Q. Do you recall what the license fee is for the State license?
A. Yes. We pay $500.00 a year, sir.
Q. And did you pay that $500.00 in April of this year?
A. Yes, sir.
Q. Now, it is correct that an application was submitted to the Tribes for a Tribal liquor license?
A. That's correct, sir.
Q. I believe your wife signed that. Were you familiar with the fact that it was being submitted?
A. Yes, sir.

MR. HAMILTON: I object, Your Honor. This is outside the scope of direct examination.
THE COURT: Overruled.

Q. (By Mr. Thomas) And did you attend at any meeting of the Business Council in connection with that application?
A. Yes, sir.

Q. Do you remember how many people—well, let me say this: Did you attend more than one meeting?

A. Yes, sir.

[111] Q. You attended two?

A. Yes, sir.

Q. Do you know how many people were at the first meeting?

A. Well, there was just the Joint Business Councils of the Arapahoe Tribe and Shoshoni Tribe.

Q. Would it be correct at that meeting what was discussed was the process for submitting an application?

A. Well, what was discussed at that meeting was that we were trying to find out what kind of application we were to fill out and what the price of the license was going to be.

Q. Did anyone tell you a price of the license?

A. No, sir, and they also didn't have an application.

Q. Then you attended at a second meeting?

A. Yes, sir.

Q. Did you have an attorney at the second meeting?

A. Yes, sir.

Q. And who was that, sir?

A. Mr. Boyer.

Q. And do you know how many people were at that meeting?

A. I couldn't tell you.

Q. And at that meeting is it correct that what was discussed was whether the license should be granted or not?

A. Well, it was a hearing.

Q. I see. On that question?

A. Right.

[112] Q. O.K. And there were several people who did make protests; is that correct, sir?

A. Yes, sir.

MR. HAMILTON: I'm going to object. This is incompetent, irrelevant and immaterial and outside the scope of direct examination.

THE COURT: We do not restrict in the Federal Courts to the direct examination. As long as it is material I let it in. I will see what they have to say.

THE WITNESS: I'll answer that. There were protests but had nothing to do with our license.

Q. (By Mr. Thomas) What was the protest?

A. The protest, one of them was against my attorney for sending a bill to her for when he defended one of her——

THE COURT: One for what?

THE WITNESS: One of the protests was against my attorney for sending a bill to her for getting her son out of trouble down in Denver and one of the other protests was a person that protested that their house got burned down and said somebody come from that bar and burned down the house, and they had no evidence whatsoever that somebody came from the bar and burned the house down.

Q. (By Mr. Thomas) Were there any other things that you recall being mentioned at that time?

A. Well, it was just a normal hearing. Somebody said [113] they didn't want to see this license issued.

Q. Is it correct that you did work at The Blue Bull from time to time?

A. Yes, sir.

Q. Did you work there regularly or just on occasion?

A. I worked there regularly, sir.

Q. Every night or did you take a night off or how did it work?

A. Oh, I was there, you know how business goes, you work twelve hours a day or something like that.

Q. Could you give the Court any idea as to who your customers were at The Blue Bull, by and large?

A. Well, I just couldn't say who they were. People came from Riverton and people came from Lander, Crowheart, Ethete, Dubois, I mean from that area there.

Q. It drew from the surrounding area?

A. It drew from a radius of approximately over fifty miles.

Q. Did you ever have any instances where you had any disturbances on the premises?

A. Yes, sir.

Q. Did you call for any help from authorities?

A. Yes, sir.

Q. Do you remember who you called?

A. Well, if it was a non-Indian I called the Sheriff's [114] department. If it was an Indian I called the Tribal

police, and that is an understanding between the Sheriff's department and the Fort Washakie police department.

Q. And how did you make the determination between the Indian and non-Indian person?

A. How did I make the determination?

Q. Yes.

A. Because I knew them.

Q. So you know whether it was an Indian or non-Indian causing the trouble?

A. Yes, sir.

Q. But you did ask for assistance from the Tribe?

A. Yes, and the reason I asked for assistance was because the Tribal police department has the understanding they take care of their own and the Sheriff's department takes care of all the rest.

Q. Did you ever have occasion to testify in Tribal Court with respect to any matter at The Blue Bull?

A. Yes, sir.

Q. This was the Tribal Court at Wind River, Fort Washakie?

A. Yes, sir.

Q. Have you ever had any burglaries at The Blue Bull Bar?

A. Oh, let's see. I think the first year we were in operation, why, we had a couple break ins [sic], yes. We are kind of out there by ourselves, you know.

[115] Q. Do you know who conducted investigations of those?

A. Well, it was Indians involved and the Reservation police—well, it wasn't the Reservation police. It was Mr. Keep, special investigator for the B.I.A.

Q. Do you know Mr. Leo Ford?

A. Yes, I do.

Q. Has he, to your knowledge, ever investigated any events at The Blue Bull Bar?

MR. HAMILTON: I am going to have to object again as being incompetent, irrelevant and immaterial.

THE COURT: I think we are getting a little off the Reservation in this case.

MR. THOMAS: I'm trying to tie my questions to The Blue Bull Bar.

Q. (By Mr. Thomas) Do you know whether Mr. Ford has ever investigated any instance?

A. I have got a short memory. I can't remember right off-hand. It has got me on the spot.

Q. Now, going back to the application, an application was made, and I believe you said you were at a hearing where the application was denied?

A. Yes, sir.

Q. Is it correct that you then did close The Blue Bull for a period of time?

A. Well, we closed The Blue Bull for a period of time [116] because on a telephone conversation Mr. Keep made the accusation if we opened up he would charge my wife with a felony.

Q. How long did you keep it closed?

A. Oh, I would say three weeks, I think. Approximately three weeks.

Q. And then you reopened?

A. Yes, sir.

Q. How long did you stay open?

A. Until they confiscated my liquor.

Q. Was there a period of time after you reopened where you closed?

A. Yes, sir.

Q. How long a period of time was that, sir?

MR. HAMILTON: Again, Your Honor, I will object as being incompetent—I think it is incompetent, irrelevant and immaterial. I don't think it has anything to do with the case.

THE COURT: Sustained.

MR. THOMAS: Well, I might submit in the way of an offer of proof, Your Honor, that it might be material in the context of the recognition by the people who were operating the business that they did comply at one point, and this perhaps would, as I say, be material on the question whether they were recognizing the authority of the Tribe.

THE COURT: His testimony said when he was [117] threatened with being charged with a felony they closed down for a while.

MR. THOMAS: Then they reopened, and I believe he said

they closed down after that. I was trying to establish how long.

THE WITNESS: We were just in the process of getting legal service. That is the reason.

MR. THOMAS: I see.

Q. (By Mr. Thomas). And I believe you said that when you arrived Mr. Keep and Mr. King were there?

A. Mr. King and Mr. Caturia.

Q. Mr. King arrived after you did?

A. No. They were all there.

Q. All three of them?

A. Yes, sir.

Q. Were there any other officers there at that time?

A. No, sir.

Q. Did they furnish you with a list of the things that they took?

A. No, they didn't to me.

Q. Did they furnish your wife with one?

A. Yes, sir.

Q. And that was the alcoholic beverages; is that right?

A. Yes, sir.

MR. THOMAS: I think I have no further questions, [118] Your Honor.

MR. HURSH: Your Honor, may I inquire of this witness? Counsel has no objection.

MR. HAMILTON: I have no objection.

THE COURT: Let's see. They are separate defendants?

MR. HURSH: Yes, Your Honor.

THE COURT: Very well.

CROSS-EXAMINATION

By MR. HURSH:

Q. Mr. Mazurie, I would like to ask whether or not on date in question Bonnie Velasquez was an employee of The Blue Bull Bar when the sale was made?

A. No, sir.

Q. She was not?

A. No, sir.

Q. Would you explain to the Court how she got involved in that sale?

A. Well, she used to work for us and she dropped by one day. Well, I had to go to Riverton and I asked her if she would stand-in for me and she said she would.

Q. Was she paid anything for this?

A. No, sir.

Q. In other words, she was just doing you a favor when this happened?

[119] A. Yes, sir.

Q. Would there have been an incident or conversation you had with Bonnie to indicate that she might have known or had reason to know that your license was having difficulties?

A. Well, no. We have never talked it over with her. Just that, you know, well, comments and things like that.

Q. She was an employee of yours when the bar was running with no difficulties as far as licensing was concerned?

A. Yes, sir.

Q. And you asked her to stand-in and do you a favor and that was on the 13th day of June, 1972?

A. Yes, sir.

MR. HURSH: I have no further question, Your Honor.

MR. HAMILTON: I have just a couple, Your Honor.

REDIRECT EXAMINATION

By MR. HAMILTON:

Q. Mr. Mazurie, you stated that you were outside of the Fort Washakie area. Let me ask you this: Do you pay taxes?

A. Yes, I do.

Q. To the State of Wyoming?

A. Yes, sir.

Q. Do you get any—are you an enrolled member of any of the Indian Tribes?

A. No, sir.

[120] Q. Do you have any Indian blood?

A. No, sir.

Q. Does the Indian department, either the Bureau of Indian Affairs or the Tribes, do they perform any Governmental functions either for you or for your land?

A. No, sir.

Q. Or to your land?

A. Just except for water.

Q. Water?

A. Right.

Q. When you call the Indian police that is because there is an Indian involved?

A. Yes, sir.
Q. And because that is what you have been told——
A. Yes, sir.
Q. ——to do?
A. Yes, sir.
Q. And that is about the only contact you have with the Indians?
A. Yes, sir.

MR. HAMILTON: No further questions.
THE COURT: Are you still a member of the city council?
THE WITNESS: No, sir, I'm not.
THE COURT: What is your business? No one asked [121] you.
THE WITNESS: I'm another bar owner, sir. I own another bar.
MR. THOMAS: I thought I might examine about Mr. Hursh's question, and also about the water.

RECROSS-EXAMINATION

By MR. THOMAS:

Q. You say that you obtain water through the Tribe or through the agency or how, Mr. Mazurie?
A. Well, it was underneath—I don't know what ditch I'm under out there. I think it is the Ray ditch, the same as when I owned the ranch out there. You have to pay charges on the land to receive the water.
Q. Is this irrigation water or drinking?
A. Yes, sir, I irrigate approximately three acres of the ten acres.
Q. I see. Now, you said that Bonnie Velasquez had been employed by The Blue Bull?
A. Yes, sir.
Q. Do you recall when her employment terminated?

MR. HAMILTON: Your Honor, that is incompetent, irrelevant and immaterial because she is charged with violating the law on one day in question.
THE COURT: What was the question again?
MR. THOMAS: I asked when her employment [122] terminated. I think it would be pertinent on the question of her knowledge.
THE COURT: You may answer if you know.
THE WITNESS: Well, Your Honor, I'm not the bookkeeper

of the business and without looking back on the records I couldn't answer that.
THE COURT: Your wife probably could answer that if she is here?
THE WITNESS: Yes, sir.

Q. (By Mr. Thomas) Was it prior to the time of the April renewal of the license and application?
A. Yes. Yes, it was.
Q. And would your testimony be then that the only time she worked—and I use that advisedly—the only time she performed services in the bar was on this day?
A. Just filling in for me as a favor.
Q. And that is the only time she did it after her employment terminated?
A. Yes, sir, as far as I can recall.

THE COURT: When was her employment terminated, approximately? Do you know?
THE WITNESS: No, sir. I couldn't answer that without looking back on the records.
MR. THOMAS: I believe he did say sometime prior to the application for the Tribal license, Your Honor.
[123] THE COURT: You are excused.

(Witness excused.)

MR. HAMILTON: I would like to call Mr. Jim Farthing.

(Witness sworn.)

JAMES A. FARTHING,

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By MR. HAMILTON:

Q. Would you please state your name, sir?
A. James A. Farthing.
Q. Where do you live, Mr. Farthing?
A. Lander, Wyoming.
Q. And what is your occupation?
A. Fremont County Clerk.
Q. Are you the duly elected County Clerk?
A. Yes.

Q. How long have you held that office, sir?
A. Since 1958.
Q. Are you familiar with the area known as—shown on the map as Exhibit G, Defendants' Exhibit G?
A. Yes.
Q. Are you familiar with the area between the southern end of the map and the Wind River?
A. Yes.
[124] Q. In that area does Fremont County acting either by itself or as an arm of the State of Wyoming perform any functions in the Fort Washakie area?
A. Yes.
Q. What functions do you perform, sir? What functions does the State perform?
A. Oh, schools are administered by the State and the County. The County maintains roads.
Q. Do you maintain the road that leads from the highway past The Blue Bull?
A. Yes.
Q. Do you maintain all of the oiled roads on the Reservation?
A. Not quite all, but almost all except for the State highways.
Q. Except for the State highways?
A. Yes, sir.
Q. These are designated as County roads?
A. Most of them are, yes.
Q. And those are designated as County roads?
A. By agreement between the County Commissioners and the Indian department of Wind River agency.
Q. Yes. How about the County Sheriff's office? Do they assert jurisdiction over non-Indians in that area?
A. As far as I know they do, yes.
[125] Q. What about public health and public welfare?
A. There is some jurisdiction there by the County and the State. I'm not real familiar with that part of it.
Q. Your office issues the liquor licenses out there, sir?
A. Yes.
Q. And has there been a liquor license at The Blue Bull, Inc., location for a number of years?
A. Yes.

Q. Starting when?
A. 1954, I believe.
Q. And continuous since that time?
A. Yes.
Q. Is that license in effect at this time and current?
A. Yes.
Q. The fees have been paid?
A. Yes.
Q. What about the voting out there? Is that run by your office?
A. Yes.
Q. For all State, County, National elections?
A. Yes.
Q. Local elections?
A. Not the Tribal elections, but the local County elections, yes.
Q. Yes.
[126] A. And I do have something to do with the school elections.
Q. With the school elections?
A. I furnish voting machines for them or the County does.
Q. All right. Have you had an opportunity to check into the tax records in regards to that area?
A. I have.
Q. Are taxes paid to the State of Wyoming by all of the deeded landholders in that area?
A. I couldn't say by all. I presume they are, yes.
Q. Have you checked into The Blue Bull, Inc., specifically, sir?
A. Yes.
Q. And do they pay taxes to the State?
A. Taxes have been paid on that ten acres since 1955.
Q. That was when the patent was issued or the year after?
A. The year after the patent was issued.
Q. Is that the normal procedure when a patent is issued?
A. If it is issued and recorded after the 1st of February it doesn't become taxable until the next year.
Q. One more question. Do you know of any Governmental functions either performed by the Tribes or the Bureau of Indian Affairs?
A. I'm not familiar with them.

MR. HAMILTON: No further questions.

CROSS-EXAMINATION

[127] By MR. THOMAS:

Q. With respect to your last answer, are you saying there are none or none that you have an indication to be concerned?

A. I wouldn't want to say there aren't any, but I'm not familiar with them.

Q. All right. Now, you said that roads are maintained by the County on the Reservation, and this is by agreement, you said, between the County, and I think you said, the agency?

A. Yes.

Q. Are the Tribes party to that agreement? Do you know?

A. I'd have to look at the agreement. The agreements are signed by the superintendent and the County Commissioners. I don't really believe the Tribes are. I'm not real sure, though. I'd have to look them up.

Q. I believe you did characterize them as County roads?

A. Yes.

Q. Do you know if the County gets a fee-title to County roads?

A. Not always.

Q. Are there occasions when it does?

A. There are occasions when it buys the right-of-way and gets a title to it.

Q. Did it buy right-of-way out on the Reservation?

A. As I recall they applied for the right-of-way through the agency through a map, and I don't believe they acquired title [128] to it. I think it is more of an easement.

Q. Easement rather than ownership?

A. Yes.

Q. Would that be true of all of the roads you were talking about?

A. It wouldn't be true of all of them. I think it is true of all the paved roads.

Q. I see. What would be the situation with respect to the other roads?

A. Some of those are—have both right-of-ways on some

of them on the Reservation. I can't specify which ones, because I can't tell. But I know some of them are.

Q. You don't know whether the right-of-way was purchased or not adjacent to The Blue Bull?

A. I wouldn't say for sure.

MR. THOMAS: I think I have no further question, Your Honor.

THE COURT: You arranged for the voting precincts and provide the ballots, do you not, to the Indian Reservation?

THE WITNESS: Yes.

THE COURT: The lawyer overlooked that. I was familiar with that aspect. I just wanted to make sure they had not changed it.

THE WITNESS: It is still in effect.

THE COURT: You are excused.

SUPREME COURT OF THE UNITED STATES

No. 73-1018

UNITED STATES, PETITIONER,

v.

MARTIN DEWALT MAZURIE, ET AL.

ORDER ALLOWING CERTIORARI. Filed February 25, 1974.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

☆ U.S. Government Printing Office: 1974—535-276/208

Supreme Court, U. S.
FILED
FEB 4 1974
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA,
Petitioner,

v

MARTIN DeWALT MAZURIE, Et Al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO MOTION OF PETITIONER FOR LEAVE TO FILE FOR A WRIT OF CERTIORARI OUT OF TIME

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA,
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MARTIN DeWALT MAZURIE, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO MOTION OF PETITIONER FOR LEAVE TO FILE FOR A WRIT OF CERTIORARI OUT OF TIME

STATEMENT

1. In 1869, Congress ratified a treaty whereby the Wind River Indian Reservation was established in West Central Wyoming containing an area of approximately three million acres. (15 Stat. 673) This Reservation to be occupied jointly by the Arapahoe and Shoshone Indian Tribes. In 1887, Congress passed legislation setting up trust

lands and providing for the issuance of patents and the subjection of the lands to the civil and criminal process and laws of the state or territory in which they are located. (24 Stat. 390, Revised May 8, 1906, 34 Stat. 182)

By various agreements, the land area of the Wind River Indian Reservation was diminished and the United States purchased several sizable acreages of the Reservation land wherein the towns of Thermopolis and Lander, Wyoming, are located. The land on which the Blue Bull, Inc., is located did not fall within any of the purchases or land exchanges between the Tribes and the United States Government.

2. Under rights granted by Congress in the Act of 1887, an original patent was issued in 1954 to the respondents' predecessor in title. (Respondents' Trial Exhibit "A") This patent contained no restriction as to the use of the land, with the exception of an irrigation system lien. The patent was fee simple and it contained the following language: "to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said claimant and to the heirs and assigns of said claimant forever". (emphasis supplied)

In 1954, the respondents' predecessor in title under this patent acquired from the State of Wyoming a valid Wyoming liquor license and founded and operated a liquor establishment on the premises which has been in continuous operation

from the years 1954 to 1972. Throughout this litigation, this State of Wyoming license was still current and valid. (R-125)

3. In February of 1972, the Wind River Tribes passed an ordinance prohibiting the sale of liquor within the Indian Country under their jurisdiction unless the seller obtained a Tribal license as well as a State license. (R-74) The respondents had operated the Blue Bull Bar prior to the enactment of the 1971 Tribal ordinance under their State license. On April 3, 1972, the respondents were given the choice of obtaining a Tribal license or facing criminal prosecution. Accordingly, on April 12, 1972, a Tribal license was requested; a public hearing held on April 17, 1972, at the conclusion of which the respondents' application was denied. The record of the Tribal public hearing is such that it is totally unintelligible and can hardly be called verbatim, inasmuch as even learned counsel's argument cannot be gleaned from the transcript. In any event, the Tribal license was denied the respondents and after a short period of inactivity the bar was opened to operate under the provisions and regulations of the State of Wyoming; the valid and existing liquor license then in effect. On June 13, 1972, federal officers seized the alcoholic beverages. Criminal prosecution was initiated on June 29, 1972, with the filing of criminal informations in the United States District Court for the District of Wyoming.

4. In the case tried before the District Judge, the Government had to carry the burden of proof

and establish that The Blue Bull Bar was located in an 'Indian community'. This requirement of proof, of the location of the land being within an Indian community, was an affirmative element of the crime as set forth in the statute, 18 U.S.C. 1154 (c). The land in question was located upon a county road and right-of-way and was fully taxed and regulated by the State of Wyoming as fee patent land, said jurisdiction having been assumed by the State of Wyoming upon the issuance of the patent in 1954.

The District Judge made his finding that The Blue Bull Bar was located in "Indian Country" and as such in violation of 18 U.S.C. 1154 (R 29-32).

5. The Court of Appeals reversed and held that the Government did not meet its burden of proof in establishing that the respondents were located within an Indian community under the provisions of 18 U.S.C. 1154 (c). (emphasis supplied)

The Court of Appeals narrowed the issue as follows:

> "Thus if it is assumed for the moment that the fee land in question is in 'Indian Country' generally, the question whether the particular place was also in a 'non-Indian community' must be resolved if it can be. If the tavern was in a 'non-Indian community' in 'Indian Country', no crime was committed . . ."

The Court of Appeals held that the Government had failed to prove the fact that the tavern was located in an Indian community and went further to indicate that the statute itself was vague and ambiguous in not providing for any standards or definitions of the term "Indian community". Thereafter, the Court of Appeals further questioned the power of the Government to regulate the respondents or to delegate that power to the Indian tribes over non-Indians living on fee patent lands within Indian Country, which was an improper delegation of governmental authority and jurisdiction to the Indian tribes. (emphasis supplied)

ARGUMENT FOR NOT GRANTING THE PETITION

1. By the provisions of Rule 22 (c) of the Supreme Court Rules, petitions for review on certiorari filed out of time are not favored. The respondents respectfully submit that this is not a case of any such crucial importance so as to require the extraordinary relief of the filing of this case on certiorari now out of time. It is noted that Marvin J. Sonosky, Esq. and Glen A. Wilkinson, Esq., counsel for both of the Indian tribes involved, were sent copies of the Court of Appeals' Opinion and Judgment Mandate dated November 8, 1973, as well as Lawrence E. Shearer, Esq. and Wallace H. Johnson, Esq., Assistant Attorney General, Department of Justice, Washington, D.C., both of whom appear on the motion for petition here. It is submitted that if this case were of such importance as now implied in the petition, that the counsel for the Indian tribes would have been in close liaison

with the proper Justice Department Division to perfect their appeal according to the rules. (App.A attached hereto)

Other than the inadvertence of the Government, there is no compelling reason why extraordinary relief should be granted the petitioners in this case who are now out of time.

2. The respondents contend that the Court of Appeals' decision does not effectively abolish control of alcoholic beverages on Indian Reservations. The respondents respectfully submit that, as pertains to non-Indian fee lands created by patent, Government control and jurisdiction has passed to and is complete in the State. The State of Wyoming has all necessary statutory regulations to adequately control licensing and sale of alcoholic beverages within these deeded portions of the Reservation owned by non-Indians. (emphasis added) Likewise, any protests that may be made about the operation of any liquor establishment so situated are properly directed to, and by law controlled by the County Commissioners and the State of Wyoming. With adequate appeal provisions to the courts, liquor operations in the State of Wyoming are quite likely among the most tightly controlled and supervised of functions within the business community and it is submitted that the state jurisdiction is complete and effective for all necessary regulatory purposes. As pertains to Indians, the Tribe has every authority under the decision of the Court of Appeals to continue to regulate their own affairs.

3. As required by Rule 19 (1) (b), the Court of Appeals has not rendered any decision in this case in conflict with the decision of another Court of Appeals on the same subject matter, i.e. the interpretation and definition of the term "Indian Community" as found in 18 U.S.C. 1154 (c). The Court of Appeals has, by their decision in this case, decided no state or territorial question in a way conflicting with applicable state or territorial law, nor has the Court's decision decided an important question of federal law that needs the intervention and supervision of the Supreme Court of the United States. The decision of the Court of Appeals is not in any way in conflict with applicable decisions of this Court and does not depart from the accepted and usual course of judicial proceedings such as to call for an exercise of this Court's power of supervision.

The petition does not fit the categorical requirements of Rule 19 of the Supreme Court Rules so as to demand exercise of the Supreme Court's power of supervision of the Court of Appeals for the Tenth Circuit.

4. The respondents further argue that the Government's contention, that the case really concerns the question of regulation and the general regulatory scheme of Congress as pertains to alcoholic beverages in Indian reservations, cannot control the issue inasmuch as this was a criminal prosecution. The Court of Appeals has simply stated that under the particular facts and circumstances of this specific criminal prosecution,

the Government could not carry its burden of proof and place these respondents as non-Indians living on fee patented lands within an 'Indian community'. As such a factual matter, this case does not fit the criteria of Rule 19 (1) (b) which concerns itself with questions of law and the procedural relief of certiorari.

5. The Indian Tribes' contention, that the State of Wyoming will allow every deeded portion within the reservation to become a bar, is totally unfounded in fact and in law. The State of Wyoming statutes are such that liquor licenses are issued on the basis of population ratios within county areas and the fear and contention of the Government and the Indian tribes to this issue is without any basis in fact so as to require the supervision of the Supreme Court of the United States over a state regulatory function.

CONCLUSION

For the foregoing reasons, a petition for a writ of certiorari filed out of time should not be granted.

Respectfully submitted.

CHARLES E. HAMILTON
Attorney for Respondents

JOHN R. HURSH
(On the Brief for Respondents)

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

HOWARD K. PHILLIPS
CLERK

OFFICE OF THE CLERK
DENVER, COLORADO 80202

TELEPHONE
303-837-3157

November 8, 1973

Charles E. Hamilton, Esquire
Attorney at Law
Broadway and Park
Riverton, Wyoming 82501

Re: No. 73-1077, U. S. A. v. Martin Dewalt Mazurie
No. 73-1078, U. S. A. v. Margaret J. Mazurie
No. 73-1079, U. S. A. v. The Blue Bull, Inc.

Dear Mr. Hamilton:

Enclosed is a copy of the opinion of the Court in the above cases. Judgments in accordance with that opinion have been entered today.

Sincerely yours,

HOWARD K. PHILLIPS, Clerk

By:

Lavon M. Irlbeck,
Deputy Clerk

li
Enclosure

cc: Marvin J. Sonosky, Esquire, Attorney at Law, 1225 - 19th Street, N. W., Washington, D. C. 20036
Glen A. Wilkinson, Esquire, Attorney at Law, 1735 New York Avenue, N. W., Washington, D. C. 20006
Lawrence E. Shearer, Esquire, Wallace H. Johnson, Esquire, Assistant Attorney General, and Jacques B. Gelin, Esquire, Department of Justice, Washington, D. C.
Honorable Richard V. Thomas, United States Attorney, P. O. Box 668, Cheyenne, Wyoming 82001

Supreme Court, U. S.
FILED
FEB 11 1974
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA,
Petitioner

vs.

MARTIN DeWALT MAZURIE, et al.,
Respondents.

BRIEF OF THE STATE OF WYOMING AS AMICUS CURIAE IN OPPOSITION TO MOTION OF PETITIONER FOR LEAVE TO FILE FOR WRIT OF CERTIORARI OUT OF TIME AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STERLING A. CASE
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STATE OF WYOMING
204 Capitol Building
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COUNSEL FOR AMICUS CURIAE

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA,
Petitioner

vs.

MARTIN DeWALT MAZURIE, et al.,
Respondents.

TO: THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Amicus Curiae, **the State of Wyoming, respectfully prays that this Court deny the MOTION FOR LEAVE TO FILE OUT OF TIME and PETITION FOR A WRIT OF CERTIORARI filed in the above-captioned case.**

INTEREST OF THE STATE

The State of Wyoming, for the protection of the welfare, health, peace, morals and safety of the people of Wyoming, has provided for the regulation of all spirituous, fermented and malt liquors sold within the boundaries of the state. (Laws 1935, ch. 87 §1; C.S. 1945 §53-201; C.S. 1957 §12-1) Under the provisions of the Wyoming Alcoholic Beverages Act any qualified person may apply for a license to sell liquor, but the number of licenses issued within any one city, town or county is limited by statute.[1] Upon successful application the licensee is given a "personal privilege" entitling him to sell liquor for one year. (Wyoming Statutes 1957 §12-13, as amended). Thereafter the license must be renewed annually. (Wyoming Statutes 1957 §12-13).

The Wyoming Alcoholic Beverages Act further provides for the protection of those within the state by providing for the license to be suspended or revoked through a court action brought in the name of the State of Wyoming by the attorney general, or any county or prosecuting attorney or through a hearing procedure before the Wyoming Liquor Commission, both actions being subject to a later appeal. (Wyoming Statutes 1957 §12-29, as amended). Thus, the State of Wyoming has protected those within its boundaries from the evils of unregulated liquor traffic and, further, provided protection, through appellate action, to those that have expended their energies and funds necessary and prerequisite to being granted

---

[1] In the instant action the County Commissioners were responsible for the license granted the Respondent, being located outside any town or city boundary and the pertinent portion of the statute reads: "Retail licenses may be issued in counties outside of incorporated cities or towns in the ratio of one retail license to each five hundred (500) population of said county outside of such cities. . . ." Wyoming Statutes 1957 §12-6, as amended.

a valid Wyoming liquor license. Respondent in this case is, and has been continuously throughout this action, holder of a valid liquor license issued under the authority of and subject to the laws of the State of Wyoming. R. 125.

The State of Wyoming takes the position that it owes Respondent and others similarly situated protection against unconstitutional encroachment on their "personal privilege" and property rights as valid licensees.

REASONS FOR DENYING THE MOTION AND PETITION

1. The State of Wyoming having jurisdiction must take cognizance of and an interest in the Respondent's and the three (3) other licenses in force and effect on the reservation, all being similarly situated, i.e., non-Indians dispensing liquor on fee-patented lands within the reservation while holding valid state licenses. Under the tribal ordinance in question any of the above licenses could be suspended, revoked or cancelled *ex parte* by the Indian Business Council without due process of law and in disregard for the liquor laws of Wyoming.

The pertinent part of the ordinance reads as follows:

> **"Sec. 6.** *Cancellation and suspension.* **Any license issued hereunder may be suspended or cancelled by the Joint Business Council for the breach of any of the provisions of this Ordinance, or of the conditions of the tribal license, upon hearing before the Joint Business Council after 10 days' notice to the licensee."**

There is no provision for an appeal from this section, nor does the Ordinance provide for an appeal of any decisions of the Joint Business Council which would effect a valuable property right held by the licensee at the time of a cancellation or suspension.

2. Although stating therein to the contrary in Section 1 thereof, the ordinance has pre-empted state law. By revoking Respondent's license and prosecuting him by criminal information without regard to the Wyoming Alcoholic Beverages Act, the Wind River Tribes and the United States Attorney have essentially abrogated the liquor laws and the sovereignty of the State of Wyoming.

The Respondent is solely within the jurisdiction of the State of Wyoming and this section of the ordinance denies him the protections of due process of law granted by the state statutes cited herein. The ordinance itself recognizes that the Tribes need jurisdiction to effectuate laws that affect those within "Indian Country."

3. The State of Wyoming in its sovereign capacity recognizes the self-governing powers of the Indian Tribe including its right, in its sovereign capacity, to regulate tribal members and property within the jurisdictional boundaries of the Tribe. United States Department of the Interior, *Federal Indian Law*, 395-6 (1958). However, the Respondent in this matter is located on land that is not within the jurisdiction of the Tribe and thus subject to state regulation. As pointed out by the Court of Appeals, Tenth Circuit in its decision:

> **"The appellant's tavern is located within the exterior boundaries of the Reservation on a small tract of land patented in fee by the United States in 1954 under 24 Stat. 390 and 34 Stat. 182 to appellant's predecessors. The patent contains no restrictions as to the use to which the land may be put. The land is taxed by the State of Wyoming, and the state provides the usual public services for it. It is in a Fremont County School District which provides schools for the area, and on a county road."**

That the State of Wyoming had jurisdiction over the Respondent, even though within the boundaries of the Wind River Reservation, can be readily shown.

Once Indian title has been extinguished and a non-Indian holds the land in fee the jurisdiction of the state, for all purposes of government, is full and complete. See, *Clairmont v. United States*, 225 U.S. 551 (1911) and *Bates v. Clark*, 95 U.S.

204 (1877). However, in the instant situation, the jurisdiction of the state can be more readily appreciated from the fact that this land has never been under the jurisdiction of the governing body of the Wind River Tribes.

But most importantly, when Congress passed legislation in 1887 providing for such patented lands it subjugated such lands to the civil and criminal process and laws of the state or territory in which the land was located. (24 Stat. 390, Revised May 8, 1906, 34 Stat. 182).

CONCLUSION

1. It is the position of the State of Wyoming that under the facts of this case, as presented by the opposing parties, that Respondent and other non-Indian fee patent land owners within the boundaries of the Wind River Indian Reservation are not solely subject to jurisdiction of the Joint Business Council for the purpose of liquor regulation. The action taken by the council infringed upon the sovereignty of the State of Wyoming and its right to govern non-Indian liquor licensees holding fee patented lands within the boundaries of the state and the Wind River Reservation.

We, therefore, respectfully submit that the petition for a Writ of Certiorari to the United States Court of appeals for the Tenth Circuit should be denied.

Respectfully submitted,

/s/ Sterling A. Case
Deputy Attorney General
State of Wyoming
204 Capitol Building
Cheyenne, Wyoming 82002

COUNSEL FOR AMICUS CURIAE

CERTIFICATE OF MAILING

I, Sterling Arthur Case, Deputy Attorney General for the State of Wyoming, do hereby certify that I served the within and foregoing BRIEF OF THE STATE OF WYOMING AS AMICUS CURIAE IN OPPOSITION TO MOTION OF PETITIONER FOR LEAVE TO FILE FOR WRIT OF CERTIORARI OUT OF TIME AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT upon counsel for Petitioner by placing one copy thereof in the United States mails, postage prepaid, to the respective attorneys of record, as follows:

To Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530;

To Wallace H. Johnson, Assistant Attorney General, Department of Justice, Washington, D.C. 20530;

To Harry R. Sachse, Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530;

To Raymond N. Zagone, Attorney, Department of Justice, Washington, D.C. 20530;

To Lawrence E. Shearer, Attorney, Department of Justice, Washington, D.C. 20530; on this 1st day of February, 1974.

/s/ Sterling A. Case
Deputy Attorney General
for the State of Wyoming
204 Capitol Building
Cheyenne, Wyoming 82002
COUNSEL FOR AMICUS CURIAE

Supreme Court, U. S.
FILED
JUL 22 1974
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA,
Petitioner,

v

MARTIN DeWALT MAZURIE, Et Al.,
Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION TO DISMISS

WRIT OF CERTIORARI AND APPEAL

CHARLES E. HAMILTON
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State of Wyoming
Amicus Curiae

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA,
Petitioner,

v.

MARTIN DeWALT MAZURIE, et al.,
Respondents.

ON A WRIT OF CERTIROARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION TO DISMISS

WRIT OF CERTIORARI AND APPEAL

The respondents, Martin Dewalt Mazurie, et al., move the Court to dismiss the writ of certiorari and appeal herein.

1. On December 28, 1973, the petitioner, United States of America, filed a petition for certiorari to the United States Court of Appeals for the Tenth Circuit in the United States Supreme Court, which petition was filed out of time under the provisions of Rule 22 of the Rules of the Supreme Court.

2. The petition for certiorari was granted on February 25, 1974, and pursuant to Rule 41 of the Rules of the Supreme Court the petitioner's brief on the merits was due for filing with the Court on April 11, 1974.

3. On April 10, 1974 petitioner requested an extension of time within which to file its brief on the merits. Under Rule 34(5) of the Rules of the Supreme Court, an extension of time to and including May 11, 1974 was granted on April 11, 1974.

4. A second and final extension, as requested by the petitioner, was granted by the Court allowing the filing of briefs no later than June 10, 1974.

5. The petitioner has failed to file its brief within the time allowed under Rule 41 of the Rules of the Supreme Court as extended two times under Rule 34 of the Rules of the Supreme Court.

6. The petitioner made no application to extend the time for filing beyond June 10, 1974. The time allowed for making such application expired on June 10, 1974.

7. The continued failure of the petitioner to file a timely brief is unexcusable and warrants dismissal of the writ of certiorari entered herein on February 25, 1974.

DATED this 1st day of July, 1974.

Respectfully submitted.

CHARLES E. HAMILTON
Attorney for Respondents

JOHN R. HURSH
(On the Brief for Respondents)

State of Wyoming
Amicus Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1015

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN DeWALT MAZURIE, *et al.*,

Respondents.

MOTION OF SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER INDIAN RESERVATION, WYOMING, *AMICI CURIAE*, FOR LEAVE TO FILE OPPOSITION TO RESPONDENTS' MOTION TO DISMISS AND OPPOSITION OF SHOSHONE AND ARAPAHOE TRIBES *AMICI CURIAE* TO RESPONDENTS' MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN DeWALT MAZURIE, *et al.*,

Respondents.

MOTION OF SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER INDIAN RESERVATION, WYOMING, *AMICI CURIAE*, FOR LEAVE TO FILE OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

The Shoshone Indian Tribe and the Arapahoe Tribe of the Wind River Indian Reservation, Wyoming, *amici curiae*, move for leave to file the accompanying opposition to respondents' motion to dismiss for failure of the United States timely to file its brief.

In support of this motion, the Tribes show that they are the real parties in interest; that the decision below denies the protection of the Indian liquor laws to the Indians of the Wind River Reservation; that the Tribes have no control over the filing of the brief of the United States; and that the briefing now before the

Court is sufficient to support a summary judgment of reversal.

In the interest of justice, the Tribes urge that the Court grant this motion and deny the motion of the respondents.

Respectfully submitted,

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July 1974

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OPPOSITION OF SHOSHONE AND ARAPAHOE TRIBES *AMICI CURIAE* TO RESPONDENTS' MOTION TO DISMISS

The Shoshone and Arapahoe Tribes of the Wind River Indian Reservation, Wyoming, *amici curiae*, oppose the respondents' motion to dismiss for failure of the United States to file its brief within the time prescribed.

The Tribes urge that the motion be denied. The Tribes and their people are the real parties in interest. They, not the United States, would suffer the consequences of a dismissal that would leave standing the decision below. The Tribes and their people, not the United States, would have to continue to live with

liquor operations uncontrolled by Federal and tribal law. Several liquor establishments, new since the decision below, are in operation on the reservation without regard to Federal or tribal law.

The Tribes and their people have no choice but to rely on the United States in the management of the litigation. That being so, it would be unjust to penalize them for whatever confusion, or oversight, may have led to the Government's failure to file within the prescribed time.

Finally, the brief in support of the petition for a writ of certiorari, the brief of *amici* in support of the petition and the respondents' response are sufficient to demonstrate the plain error below and warrant summary reversal.

CONCLUSION

The Tribes and their people, the real parties in interest, who even now are suffering from the results of the decision of the court of appeals, should not be

made the victims of mistake or oversight beyond their control. The Court is urged to deny the respondents' motion to dismiss.

Respectfully submitted,

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No. 73-1618

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN DEWALT MAZURIE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 487 F. 2d 14. The district court did not render an opinion. Its judgment of conviction with general findings (Pet. App. C) is not reported.

JURISDICTION

The judgments of the court of appeals (Pet. Apps. B1, B2, and B3) were entered on November 8, 1973. The petition and a motion for leave to file the petition out of time were filed on December 28, 1973. This Court granted the petition on February 25, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1154, which makes it a criminal offense to introduce spirituous liquor into Indian country, but excludes from the definition of Indian country "fee-patented lands in non-Indian communities," is unconstitutional as applied to respondents because the term "non-Indian community" is "indefinite and vague."

2. Whether Congress has the authority, under Article I, Section 8, Clause 3, and other provisions of the Constitution of the United States, to regulate and control the introduction of alcoholic beverages into Indian country, as defined by 18 U.S.C. 1151 and 1154.

3. Whether 18 U.S.C. 1161, which permits sales of spirituous liquor in Indian country if in accordance with state law and "an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the federal register," is an unconstitutional delegation of authority by Congress to the Indian tribes.

STATUTES INVOLVED

18 U.S.C. 1151 provides in pertinent part:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation * * *.

18 U.S.C. 1154 provides in pertinent part:

> (a) * * * whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.
>
> * * * * * *
>
> (c) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

18 U.S.C. 1161 provides:

> The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

STATEMENT

1. The Wind River Reservation is a major Indian reservation established by treaty in 1868 (Treaty of

July 3, 1868, 15 Stat. 673) located in central Wyoming and occupied jointly by the Arapahoe and Shoshone Indian Tribes (the Wind River Tribes). See *Shoshone Tribe* v. *United States*, 299 U.S. 476. As a result of various allotment Acts, there are scatterings of non-Indian held land within the reservation,[1] as is the case with many reservations.[2] Such non-Indian held lands "within the limits of any Indian reservation" are within the definition of "Indian country" in 18 U.S.C. 1151.

Prior to 1953, federal legislation generally prohibited sales of liquor to reservation Indians and the introduction of liquor into Indian country. See 18 U.S.C. 1154. See also United States Department of the Interior, *Federal Indian Law*, pp. 381–393 (1958). In 1953, however, Congress passed a local option Act which allowed Indian tribes, with the approval of the Secretary of the Interior, to permit the sale of liquor within Indian country (Act of August 15, 1953, 67 Stat. 586, 18 U.S.C. 1161). The Wind River Tribes, in response to the new law, adopted an ordinance in 1953 which permitted the sale of liquor within the Reservation if done in accordance with Wyoming law. Eighteen years later, in February 1971, that ordinance was superseded by a new ordinance (Ordinance No. 26), which was adopted by the Wind River Tribes, approved by the Secretary of the Interior, and published in the Federal Register on January 27,

[1] The Bureau of Indian Affairs informs us that of the 2,288,500 acres within the Reservation, 403,422 are owned by non-Indians.

[2] See *Seymour* v. *Superintendent*, 368 U.S. 351. *See also Mattz* v. *Arnett*, 412 U.S. 481.

1972 (37 Fed. Reg. 1253–1254, R. 54–55).[3] The new ordinance prohibits the sale of liquor within the Indian country under the Tribe's jurisdiction unless the seller has obtained a tribal license as well as a state license (Pet. App. A, p. 19; see also stipulation, A. 8).

2. The Blue Bull was a bar located on the Wind River Reservation on land owned by Blue Bull, Inc., a Wyoming corporation.[4] The corporation began operating the bar sometime after passage of the Tribe's 1953 ordinance under a retail liquor license issued by Fremont County, Wyoming (Pet. App. C, p. 33). The corporation is owned by respondent Margaret Mazurie and the bar was managed by her husband, Martin Mazurie (A. 8–10, 65; Pet. App. C, p. 33).

On April 3, 1972, several months after the official publication of Ordinance No. 26, an officer of the Bureau of Indian Affairs notified the Mazuries that they would be subject to criminal charges if they did not apply for a tribal liquor license (A. 9, 61–63), and on April 12, 1972, they applied (Pet. App. C, p. 33; A. 8; R. 56–58). The Tribes held a public hearing on the application on April 17, 1972, which Mr. Mazurie and the Mazuries' lawyer attended (R. 67–73).

At that hearing one witness testified that the people at the bar had been "singing all night, shooting guns

[3] "R" refers to the one-volume record on appeal, a copy of which has been lodged with the Clerk.

[4] The Blue Bull was closed when its stock was seized by federal agents (see p. 6, *infra*). We are informed by the attorney for the Tribes that it was reopened after the decision of the court of appeals, but that in April 1974, the County of Fremont refused to renew its license and it is again closed. The case is, of course, not moot because the criminal convictions of the respondents remain at issue.

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over there and meeting" and protested granting the license (R. 67). Another witness testified that there had been twelve killings on the reservation, the majority of which had to do with alcohol (R. 67). The Chairman of the Council termed the bar "a public nuisance" (R. 68). The Chairman of the Tribes' housing committee testified that drunks from the bar wander into a nearby Indian housing development at all hours of the night disturbing elderly members "who would like to be left alone and they can't get their proper rest" (R. 68). There was also a discussion of the problem of Indian minors being permitted at the bar, which Mr. Mazurie apparently admitted to be a problem (R. 70–72). Respondents' counsel spoke in favor of the bar, arguing that the Mazuries would do better in the future, that other bars had not been closed, and that the license fee to the tribes for the bar would be from $300 to $1500 per year (R. 68–70). At the end of the hearing the application was denied (Pet. App. C, p. 33; R. 75).

For approximately three weeks following the denial of the tribal liquor license, the Mazuries closed the Blue Bull. They thereafter reopened it until June 13, 1973, when federal officers seized its alcoholic beverages (Pet. App. C, p. 33; A. 71).[5]

3. This prosecution was initiated on June 29, 1972, when the United States filed a criminal information in the United States District Court for the District of

[5] The information also charged Bonnie Ellen Velasquez with the same offense, but the court dismissed the charge as to her on the ground that she, unlike respondents, did not knowingly violate the statute. A. 7, Tr. 136–137 (Tr. refers to the one-volume trial transcript lodged with the Clerk).

Wyoming charging that "within the exterior boundaries of the Wind River Indian Reservation and within the Indian Country * * * [respondents] unlawfully, wilfully and knowingly did introduce * * * into the Indian Country malt and spirituous and vinous liquor and beer and ale and wine and ardent and intoxicating liquor" in violation of 18 U.S.C. 1154 (A. 5; R. 1).

The case was tried before a judge alone. The parties stipulated as to the ownership and management of the bar, its location on fee land within the Reservation, the passage and publication of Ordinance No. 26, and the application for and denial of a tribal license. They also stipulted that witnesses would testify that they had purchased liquor at the bar after the denial of a license (A. 8–10).

The evidence showed that the Blue Bull is not part of a right of way through an Indian reservation (A. 65).[6] As to whether it is located on "fee-patented lands in [a]non-Indian communit[y]" (18 U.S.C. 1154(c)), the evidence showed that it is located on a ten-acre tract of fee-patented land three quarters of a mile from Fort Washakie, Wyoming, the nearest village (A. 65, 31–32). Fort Washakie, an unincorporated village, is the location of the Wind River Indian Agency of the Bureau of Indian Affairs and of the tribal headquarters of the Wind River Tribes (A. 25, 69–70).

[6] 18 U.S.C. 1154(c) excludes from "Indian country" for the purposes of Section 1154 "* * * fee-patented lands in non-Indian communities or rights of way through Indian reservations * * *" (see p. 3, *supra*). The exclusion of rights-of-way from the definition allows liquor to be transported through reservations without tribal regulation.

The evidence further showed that in a 20-square mile area with Fort Washakie roughly in the center, there are 212 families, of which 170½ are Indian families and 41½ are non-Indian families (A. 28).[7] The superintendent of the state school district in which Fort Washakie is located testified that the district school is located about two and a half miles from the Blue Bull (A. 21) and that of a total of 243 students 223 are Indian (A. 20). Mr. Mazurie testified that the bar served both Indians and non-Indians; that there sometimes were "disturbances" at the bar; and that if the disturbance was by a non-Indian he would call the sheriff's office, and if it was by an Indian he would call the tribal police at Fort Washakie (Tr. 69–70, 113–114). No witness testified that the Blue Bull was located in a non-Indian community. Mr. Mazurie characterized the location by saying "We are kind of out there by ourselves, you know" (A. 70).

On the basis of this record, the district judge, who was also personally familiar with the area (Tr. 32), found that the Blue Bull was located in Indian country as defined in 18 U.S.C. 1151. The court held that Tribal Ordinance No. 26 was valid and that "The said defendants in dispensing intoxicants from the Blue Bull, Inc., absent a license from the Joint Business Council of the Shoshane and Arapohoe Tribes violated Section 1154 of Title 18, U.S.C." (Pet. App. C, p. 35). The respondents were convicted and each was fined $100 (A. 11–16).

[7] A mixed-marriage family was counted as ½ family in each category (A. 28).

The court of appeals reversed (Pet. App. A, pp. 18–28; 487 F. 2d 14). It did not find that respondents were selling liquor in a non-Indian community, but instead held:

> that the terminology of "non-Indian community" is not capable of sufficiently precise definition to serve as an element of the crime herein considered, aside from other factors or elements with similar infirmities. The statute is thus fatally defective by reason of this indefinite and vague terminology. [Pet. App. A, p. 24; 487 F. 2d at 18.]

As another basis for reversal, the court held that the provisions of 18 U.S.C. 1161, which permit the Indian tribes to set the criteria under which alcohol may be introduced into Indian country under their jurisdiction by adopting ordinances so providing,[8] constitute an improper congressional delegation of authority to the Indian tribes (Pet. App. A, pp. 26–27; 487 F. 2d at 18–19).

Finally, the court of appeals suggested[9] that Congress does not have the authority to regulate and control the sale of alcohol to Indians on fee-patented land owned by non-Indians within Indian reservations, stating: "It is obvious that the authority of Congress under the Constitution to regulate commerce with Indian Tribes is broad, but it cannot encompass the relationships here concerned" (Pet. App. A, p. 27; 487 F. 2d at 19).

[8] The ordinance must be certified by the Secretary of the Interior and published in the Federal Register (18 U.S.C. 1161).

[9] See Pet. App. A, p. 26; 487 F. 2d at 18.

SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that the exception for "non-Indian communities" in 18 U.S.C. 1154, which makes it a criminal offense to introduce spirituous liquor into Indian country, renders the statute unconstitutionally "indefinite and vague." This Court's decisions make it clear that in a case not involving First Amendment rights a statute should not be declared facially void for vagueness when in the case before the court the statute gives adequate warning of the conduct proscribed.

In the instant case not only is it clear that the respondents were not in a "non-Indian community" and thus were not excepted from the operation of the statute, but federal officials specifically warned them in advance that their sale of alcoholic beverages, without a tribal permit, would be a violation of 18 U.S.C. 1154. Thus, the statute is not unconstitutionally vague as applied to the respondents.

2. Article I, Section 8, Clauses 3 and 8 of the Constitution, which authorizes Congress to regulate commerce "among the several States, and with the Indian Tribes" and to enact all "laws which shall be necessary and proper for carrying into Execution * * * all * * * Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," provides Congress with authority to regulate and control the sale of liquor on Indian reservations, including sales by non-Indians on fee-patented lands. *Perrin* v. *United States*, 232 U.S. 478.

3. Congress may, with appropriate safeguards (as here), properly delegate to the Tribes the right to

control the sale of liquor within their reservations. Indian tribes are not simply private landowning organizations, as characterized by the court of appeals, but governmental entities possessing governmental powers, subject to the control of Congress. The delegation here, made in furtherance of Congress' trust responsibility and carefully circumscribed to protect the interests of non-Indians as well as those of the Tribes, is valid.

ARGUMENT

I

THE EXCEPTION PROVIDED FOR "NON-INDIAN COMMUNITIES" IN 18 U.S.C. 1154 DOES NOT MAKE THAT STATUTE UNCONSTITUTIONALLY VAGUE AS APPLIED TO THE RESPONDENTS

The court of appeals held that:

> the terminology of "non-Indian community" is not capable of sufficiently precise definition to serve as an element of the crime herein considered, aside from other factors or elements with similar infirmities. The statute is thus fatally defective by reason of this indefinite and vague terminology. [Pet. App. A, p. 24; 487 F. 2d at 18.] [10]

The court of appeals stated that while the term "non-Indian community" could properly apply to some towns and smaller communities within the Reservation, there was no proof that the Blue Bull

[10] The pertinent "element of the crime" here, of course, is "the Indian country" (18 U.S.C. 1154(a)), a term of art defined in 18 U.S.C. 1151. The term "non-Indian communities" is used only in 18 U.S.C. 1154(c) in providing for an exclusion of a portion of the Indian country from the applicability of Section 1154.

was within any community or what the standards for a community or Indian community are (Pet. App. A, pp. 23–24; 487 F. 2d at 17–18). In our view, there is no doubt in the application of the statutory terms to the facts of this case, and the court therefore should have affirmed the conviction rather than declared an Act of Congress unconstitutional for vagueness. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, No. 73–206, decided June 19, 1974, slip op., p. 22. See, also, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610; *United States* v. *National Dairy Corp.*, 372 U.S. 29, 32–33; *United States* v. *Raines*, 362 U.S. 17, 21.[11]

There is, first, no basis for doubting that the respondents were properly apprised that their conduct, the sale of alcoholic beverages within the boundaries of the Wind River Reservation (obviously "Indian country" as defined in 18 U.S.C. 1151) without a tribal liquor license, was within the general proscription of 18 U.S.C. 1154 and 1161. Until 1953, 18 U.S.C. 1154 and 18 U.S.C. 1161 prohibited all sales of alcoholic beverages within Indian reservations whether on fee land or trust land and regardless of the wishes of the Tribes. The statutes were then amended to provide for tribal control of the introduction of liquor into the reservations, except in non-Indian communities. Under a tribal ordinance permitting sales by anyone possessing a state license, respondents began business.

[11] Since the statute at issue here in no way involves regulation of expression, this case presents none of the special requirements of drafting precision in that area. See, *e.g.*, *Coates* v. *City of Cincinnati*, 402 U.S. 611; *Smith* v. *Goguen*, No. 72–1254, decided March 25, 1974.

Then Ordinance No. 26, requiring Tribal licenses, was approved and published by the Secretary and respondents' application for a Tribal license was denied. Thereafter, respondents could not lawfully continue their liquor sales operation unless they were conducting it in a non-Indian community, within the meaning of the exception in 18 U.S.C. 1154(c).

Whatever difficulty might be imagined in applying this exception in some other situation, it is clear, as the district court found, that the Blue Bull is not in such a community. As the record shows (see the Statement, *supra*), the closest area which could be considered a "community" (in the ordinary meaning of the word) is Fort Washakie, three-quarters of a mile away, and it is clearly an Indian community: the Tribal headquarters and Indian Agency are there and within an area of 20 square miles, with Fort Washakie as the center, there are only some 212 families of which 170½ are Indian families. And if the Blue Bull is not in a "community" at all for purposes of the exception, then it is equally clear that the exception is inapplicable and the general proscription governs. Since there is thus no basis for considering the Blue Bull to be within the statutory exception for "non-Indian communities" the court of appeals erred in holding that respondents were not properly apprised that their conduct was prohibited by 18 U.S.C. 1154.

Moreover, after Ordinance No. 26, requiring Tribal licenses, was enacted, approved and published, the Ordinance and the fact that a failure to comply with its requirements would constitute a violation of 18 U.S.C.

1154 were specifically brought to the attention of Margaret Mazurie by the Special Agency Officer of the Wind River Reservation (A. 9). The respondents then applied for a tribal liquor license (A. 8–9), which was denied by the Joint Business Council of the Tribes (A. 9). The respondents then chose to sell alcoholic beverages at the Blue Bull in open defiance of the rejection of their application for a license, and were prosecuted for doing so. On the facts of this case, therefore, there is no realistic basis for the court of appeals' holding that respondents were denied fair warning that their conduct was proscribed by the statute.

II

CONGRESS MAY CONSTITUTIONALLY REGULATE OR PROHIBIT THE SALE OF SPIRITUOUS LIQUOR ON FEE-PATENTED LANDS OWNED BY NON-INDIANS BUT LOCATED WITHIN INDIAN RESERVATIONS

The court of appeals, without citation of authority, stated that it doubted that Congress has the constitutional authority to regulate a business on unencumbered fee land within an Indian reservation (Pet. App. A, p. 26; 487 F. 2d at 18). This doubt, which may have influenced other aspects of the decision, is unwarranted.

Article I, Section 8 of the Constitution gives Congress "* * * Power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *." See, generally, *Morton* v. *Mancari,* No. 73-362, decided June 17, 1974, slip op., pp. 16–20. This power, as this Court has repeatedly held, encompasses the power to prohibit

or regulate the sale of alcoholic beverages to tribal Indians, and to prohibit or regulate its introduction into Indian country at all. *United States* v. *Holliday,* 3 Wall. 409, 417–418; *United States* v. *43 Gallons of Whiskey, Etc.,* 3 Otto 188, 194–195; *Ex parte Webb,* 225 U.S. 663, 683–684; *United States* v. *Wright,* 229 U.S. 226, 237–238; *Perrin* v. *United States,* 232 U.S. 478, 482; and *United States* v. *Nice,* 241 U.S. 591, 597.

Moreover, in *United States* v. *Perrin, supra,* this Court expressly held that Congress has power to prohibit the sale of intoxicating liquors on privately held land in an Indian Reservation, or even in an area ceded by a Tribe to the United States, but adjacent to a Reservation. Perrin, a non-Indian, was convicted of violating the Act of August 15, 1894, 28 Stat. 319, by selling intoxicating beverages within his premises on privately held land in the town of Dante, an organized municipality, located on lands ceded by the Yankton Sioux. In upholding the validity of the challenged statute, this Court stated (232 U.S. at 482):

> The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a State, does not admit of any doubt. It arises in part from the clause in the Constitution investing Congress with authority "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and in part

> from the recognized relation of tribal Indians to the Federal Government. * * *

The court of appeals therefore erred in suggesting that the United States is without constitutional authority to regulate the sale of alcoholic beverages on fee-patented land owned by non-Indians within the exterior boundaries of an Indian reservation. Ample power for such regulation is conferred on Congress by Article I, Section 8, Clauses 3 and 8 of the Constitution, which authorizes it to enact all laws "necessary and proper for carrying into Execution * * * all * * * Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," including the power to regulate commerce "among the several States, and with the Indian Tribes," the treaty power, and the proprietary powers of Article IV, Section 3. See *Perrin, supra*, 232 U.S. at 482–485; see also *Worcester* v. *Georgia*, 6 Pet. 515, 559; *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685.

III

18 U.S.C. 1161 IS NOT AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY TO THE INDIAN TRIBES

As an additional basis for reversing the respondents' convictions, the court of appeals, without citation of authority, held that if Congress has the power to regulate the respondents' conduct, the provisions of 18 U.S.C. 1161, which in effect permit the various Indian tribes to control the introduction of liquor into their reservations, constitute an improper

delegation of congressional authority (Pet. App. A, pp. 26–28; 487 F. 2d at 18–19).

As we have shown in point II above, Congress does have the requisite constitutional authority to regulate or prohibit the respondents' conduct. Its constitutional authority to permit an Indian tribe to regulate the introduction of liquor into its Reservation is, in our view, also clear.

Control of the sale of alcohol within reservation boundaries is of extreme importance to the Indian tribes. While alcoholism is a problem throughout the country, it is a particularly serious problem for Indians. The alcoholism death rate for Indians in recent years has been approximately five times the rate for the country as a whole. National Institutes of Health, *Suicide, Homicide and Alcoholism among American Indians*, pp. 25–31 (1973). Of equal significance, the Bureau of Indian Affairs informs us that more than 95 percent of all crimes on Indian reservations are committed by persons under the influence of alcohol. These problems have long been a matter of great concern to tribal governments. Indeed, Cohen notes that "the first federal control measure was enacted, at least in part, in response to the verbal plea of an Indian chief to President Thomas Jefferson on January 4, 1802." [12]

In striking down Congress' limited delegation of power to the tribes under the present statutory scheme (to grant exceptions to the congressional prohibition within the boundaries of their own reservations), the

[12] Department of the Interior, *Federal Indian Law*, p. 381 (1958 ed.).

court of appeals, in our view, misconceived both the legal attributes of an Indian tribe and the power of Congress to make appropriate delegations of authority in a regulatory statute.

1. The court of appeals' opinion characterizes Indian tribes as private, voluntary organizations possessing no attributes of sovereignty and without authority, except as a landowner, over non-members within their reservations (Pet. App. A, pp. 25–28; 487 F. 2d 18–19). This characterization is incorrect. Indian tribes are not simply private land owning organizations,[13] but governmental units which are, in most instances, parties to treaties with the United States and which the United States Constitution treats *in pari materiae* with states and foreign nations. Article I, Section 8, Clause 3. See *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 168–173.

A Tribe's authority over non-Indians within a reservation is necessarily limited. Non-Indians are not represented in the tribal government (though they are, of course, represented in the federal government which has ultimate control over the Tribe). But where essential Indian interests are at stake, such as in a suit by a non-Indian against an Indian regarding transactions on a reservation (*Williams* v. *Lee*, 358 U.S. 217) or control of hunting and fishing rights within a reservation (*Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87; *Quechan Tribe* v. *Rowe*, 350 F. Supp. 106 (S.D. Cal.), the Tribe's jurisdiction over non-Indians is recognized. The regulation

[13] They are, of course, typically beneficial owners of lands held in trust by the United States.

of liquor on the reservation is no less an important Indian interest.

Indeed, there is a strong case, in our view, that even without a delegation of authority from Congress, a Tribe, unless prevented by Congress, would have the right to regulate the introduction of liquor within its reservation.[14] But the Court need not reach that question, for Congress has expressly delegated to the Tribes the authority here exercised. Our point is that this delegation is not to a private body, or trade organization, but to an appropriate governmental unit.

[14] In *Morris* v. *Hitchcock*, 194 U.S. 384, the Supreme Court upheld the right of a tribe to require a permit fee of $25 per year from non-members of the tribe for the privilege of grazing cattle on reservation land and, in *dicta*, the right to charge license fees for doing business within a reservation so long as approved by the President and not prohibited by Congress. The Court quoted with approval from opinions of two Attorneys General stating "Purchasers of lots do so with notice of existing Indian treaties * * * [s]uch lands are sold under the assumption that the purchasers will comply with the local laws." *Id.* at 391–392. *Morris* was followed in *Buster* v. *Wright*, 135 Fed. 947, 950 (C. A. 8), appeal dismissed, 203 U.S. 599, which held that a merchant can be required by tribal ordinance to pay a permit tax to a tribe as a condition precedent to doing business on his privately owned land within a reservation. The court of appeals said:

"The authority of the Creek nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origins in any act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. * * * The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek Tribe itself."

See also *Iron Crow* v. *Oglala Sioux Tribe of the Pine Ridge Reservation*, 231 F. 2d 89 (C.A. 8).

2. In 1832, after regulation primarily through the Executive power to make treaties and to license traders, Congress enacted the first general prohibition of the sale of liquor to Indians. Act of July 9, 1832, 4 Stat. 564. By 1938,[15] two rigid prohibitions had been established. First, it was illegal to sell or otherwise make liquor available to any Indian who was a ward of the government. This prohibiton had no geographic limitation and thus applied equally in Washington, D.C., Phoenix, Arizona, or an Indian reservation. Second, it was illegal to introduce or attempt to introduce any intoxicant into Indian country. In 1949, for the benefit of non-Indians, rights-of-way and non-Indian communities were excepted from the definition of Indian country as applied to the liquor prohibitions. Act of May 24, 1949, 63 Stat. 89, 94, 18 U.S.C. 1154(c). But the absolute prohibitions relative to Indians remained—prohibitions which gave no consideration to differences in the desires or cultural (or physical) situations of the various tribes, or of individual Indians.

In 1953, in response to complaints that the then existing scheme was discriminatory against Indians, Congress enacted the Act of August 15, 1953, 67 Stat. 586, entitled "An act to eliminate certain discriminatory legislation against Indians in the United States." The Act provided that the various prohibitions against sale of liquor to Indians shall not apply outside of Indian country "nor to any act or transaction within

[15] See generally *Federal Indian Law*, *supra*, at 386–390; see also Act of July 23, 1892, 27 Stat. 260, as amended by Act of June 15, 1938, 52 Stat. 696.

any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior and published in the Federal Register." In other words, with the requirements that the transactions be in accord with state laws and that the enabling ordinance be approved by the Secretary of the Interior and published, Congress returned to the tribes a measure of self-government concerning the use of liquor in their reservations.

The Department of the Interior supported the Act, stating, in a letter (from the Assistant Secretary of the Interior) included in both the House and Senate Reports:[16]

> I consider the laws which prohibit the sales of intoxicants to Indians as discriminatory and agree that these laws should be made inapplicable to transactions occurring outside of Indian country * * *. I also believe that the laws should be made inapplicable to transactions occurring within the Indian country, but only if such transactions are in conformity with the ordinances of the tribes concerned and are not contrary to State law.

The Act was passed without floor debate. In a later letter[17] from the Assistant Secretary to the Bureau of the Budget urging the President to sign the Act,

[16] H. Rep. No. 775, 83d Cong., 1st Sess. 2–3; S. Rep. No. 722, 83d Cong., 1st Sess. 2.

[17] Copies of this letter have been lodged with the Clerk and furnished to opposing counsel.

the Department described the purpose of the Act in more detail, emphasizing its local option feature:

> The effect of this second change in the Indian liquor laws would be to place these laws on a local option basis. If the Indians on a given reservation wish Federal prohibition to continue on that reservation, all they have to do is to refrain from adopting an ordinance to the contrary. If, on the other hand, they wish to terminate Federal prohibition, in whole or in part, they have only to adopt an ordinance specifying what transactions in intoxicating liquors they wish to permit on their reservation. These transactions will thereupon cease to be subject to the Indian liquor laws if, and only if, they are permitted by the liquor laws of the State where the reservation is situated. Thus, the bill recognizes the principle of tribal self-government, but requires that it be exercised in a manner consistent with the public policy of the State.

The bill, of course, also required consent of the Secretary and publication in the Federal Register.

This delegation was within the power of Congress to make all laws necessary and proper for the exercise of its powers in this field (p. 14–16, *supra*). This Court has repeatedly recognized the propriety of congressional delegations of authority, with appropriate safeguards, in the enactment of regulatory legislation. See, *e.g.*, *United States* v. *Howard*, 352 U.S. 212; *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381. See, generally, Davis, *Administrative Law*, pp. 74–76, 152–158 (1965).

Combatting alcoholism on reservations is an appropriate congressional concern (see point II, *supra*), as

is fostering the powers of tribal government, and thus of Indian responsibility for matters significantly affecting tribal Indians. See *Morton* v. *Mancari*, *supra*. See, also, the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461, *et seq.* The Acts in question here combine those two purposes, in making a limited delegation of authority to the Tribes in a manner which preserves rights of non-Indians and which provides for government supervision over the Tribes' actions. The rights of non-Indians within Indian country are protected by 18 U.S.C. 1154(c) which exempts rights-of-way, and fee patented lands within non-Indian communities, from the liquor prohibtion, even though these exemptions may be contrary to the Tribes' wishes, and by 18 U.S.C. 1154, which allows the Tribes to permit introduction of liquor into Indian country only if it does not violate state law. Federal supervision is preserved by the requirement that the tribal regulation be approved by the Secretary of the Interior and published in the Federal Register.

In the exercise of its responsibility to the Indian tribes as their guardian, it is highly appropriate for Congress to provide for meaningful participation by the Tribes in determining what is in their own best interest, as was done here. In light of the broad authority of Congress in fulfilling its trust responsibility (see *Board of Commissioners* v. *Seber*, 318 U.S. 705, 715–719; *Morton* v. *Mancari*, *supra*), the carefully delimited delegation (or return) of authority to the Tribes at issue here was well within Congress' legislative power.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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NO. 73-1018

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, Petitioner

v.

MARTIN DEWALT MAZURIE, et al.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

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Argument:

I. (a) The United States failed and was unable to meet its burden of proof to establish the basic jurisdiction element of a prosecution under 18 U.S.C. 1154 establishing that the geographical location of the Respondents' establishment was within an "Indian Community" 11

(b) That the terminology "Non-Indian Community", as found within 18 U.S.C. 1154 is incapable of a sufficiently precise definition to adequately define the boundaries of criminal responsibility thereunder and is accordingly unconstitutionally indefinite and vague 15

II. (a) That the Act of Congress of August 15, 1953, 67 Stat. 586, 18 U.S.C. 1161, and the subsequent action of the Wind River Indian Tribes in 1953 acting pursuant to the term thereof, terminated Federal control, sovereignty, and jurisdiction for the regulation of liquor on the Wind River Indian Reservation and vested same fully in the State of Wyoming 19

(b) That Tribal Ordinance No. 26, enacted eighteen years after relinquishment of sovereignty, control, and jurisdiction of

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intoxicating liquors to the State of Wyoming, could not operate to terminate the jurisdiction once relinquished and vested in the State. 19

III. (a) Congress does not have the authority to delegate regulatory powers over intoxicating liquors, with penal sanctions, to the Tribal Councils allowing said councils to govern non-Indian fee-patented land owners who are not allowed to vote, who are not represented on the council, who have none of the safeguards of the Federal Administractive Procedures Acts, who do not have recourse to the courts for grievances from adverse decisions, and who are required to pay fees not required of Indian licensees thereunder 22

(b) That the issuance of a Patent to a non-Indian operates to extinguish Indian title and jurisdiction over the lands in question and vests same within the regulatory function and police powers of the State of Wyoming . . . 22

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1018

UNITED STATES OF AMERICA, Petitioner,

v

MARTIN DEWALT MAZURIE, Et Al,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

1. (a) Did the United States fail to meet its burden of proof establishing the jurisdictional element of an "Indian community" as applied to the Respondents in the context of 18 U.S.C. 1154:

(b) Whether or not the terminology "Non-Indian community", as a jurisdictional element of this criminal prosecution alleged under the provisions of 18 U.S.C. 1154, is incapable of a sufficiently precise definition to define the boundaries of criminal responsibility and accordingly unconstitutionally indefinite and vague.

2. (a) If the Act of Congress, August 15, 1953, 67 Stat. 586, 18 U.S.C. 1161 and the subsequent action of the Wind River Tribes in 1953 acting pursuant thereto operated to terminate federal pre-emptive controls of liquor on the Wind River Indian Reservation vesting same in the State of Wyoming; and

(b) If the tribal government has the power to terminate relinquished jurisdiction over liquor transactions from the State of Wyoming as pertains to non-Indian citizens of the state owning fee-patented land.

3. (a) If Congress has the authority to delegate regulatory powers over intoxicating liquors, with penal sanctions, to tribal councils so as to allow said councils to govern non-Indian fee-patented landowners, who are not allowed to vote or be represented thereon, who are without the safeguards of the Federal Administrative Procedures Act, who are without recourse to the courts for grievances, and who are required to pay fees not required of Indian licensees thereunder; and

(b) If the issuance of a patent, without restriction or encumbrances, operates to extinguish Indian jurisdiction over the lands vesting same in the State of Wyoming.

STATUTES INVOLVED

18 U.S.C. 1151 providing:

> Except as otherwise provided in Sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation***.

18 U.S.C. 1154 providing:

> (a)*** Whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years or both.
>
> * * * * * * * *
>
> (c) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian Reservations, and this section does not apply to such lands or rights-of-way in absence of a treaty or statute extending the Indian liquor laws thereto.

18 U.S.C. 1161 providing:

> The provisions of Sections 1154, 1156, 3113, 3488, and 3618, of this title shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

STATEMENT

1. By treaty of July 3, 1868, the Wind River Indian Reservation was established in West Central Wyoming, reaching at that time an area of approximately three million acres. The lands were occupied by the Arapahoe and Shoshone Tribes, hereinafter referred to as the Wind River Tribes. Through various agreements over the years, the size of the reservation was diminished and over fifty

per cent of the original reservation was ceded to the United States. Thereafter, as a result of the various Indian Allotment Statutes, approximately twenty-two per cent of the remaining land area in the Wind River Reservation was deeded to non-Indian owners and patents issued thereon. Although these patented lands are within the original exterior boundaries of the Wind River Indian Reservation, the non-Indian owners thereof in fee are not members of the Wind River Tribes, nor are they represented in the Joint Business Councils thereof, entitled to vote in the tribal government, nor do they have access to any court for grievances that may arise due to the acts of the tribal governments. Approximately five hundred non-Indian land owner citizens of the State of Wyoming are subjected to the regulations and ordinances governing them and the use of their fee-patented lands by the Wind River Tribes, without representation.

In 1953, federal legislation was introduced and enacted which removed the general prohibitions against the sale of liquor on Indian reservations.1 Acting in accordance with the newly enacted federal statutes allowing the sale of liquor, the Wind River Tribes, with the approval of the Secretary of the Interior, began to permit the sale of alcoholic beverages on the Wind River Indian Reservation and transferred all regulation and control thereof to the State of Wyoming.

2. Shortly after the federal delegation of regulatory authority to the State of Wyoming, the Respondents' predecessor in title obtained a patent from the United States to certain lands located within the exterior boundaries of the Wind River Indian Reservation. The patent was unrestricted as to the use of the lands in question.2 In 1954, the Respondents' predecessor in title obtained a Wyoming liquor license as issued by the Fremont County Commissioners of the State of Wyoming and began operating a retail liquor trade on the deeded land. (Pet. App. C., P. 33)

[1]Act of August 15, 1953, 67 Stat. 586, 18 U.S.C. 1161

[2]A.65 A. refers to the Single Appendix filed herein; R refers to the one-volume Record on Appeal.

3. Approximately eighteen years later, the Joint Business Council of the Wind River Tribes unilaterally attempted by enactment of Ordinance No. 26, to extinguish the previously delegated regulatory functions to the State of Wyoming. This new ordinance carried with it a general prohibition of the sale of liquor on the Wind River Indian Reservation unless an applicant, be he Indian or non-Indian, obtained a license from the Tribal government as well as one from the State of Wyoming. (Pet. App. A., P. 19; see also Stipulation, 8) The ordinance carried with it no administrative rules and regulations for the conduct of hearings on licenses, specified different fee structures for Indian vis a vis non-Indian applicants, and provided no procedural safeguards, including access to the courts, for non-Indian applicants.

4. The Blue Bull Bar, Inc., is a Wyoming corporation and is owned by the Respondents, Margaret Mazurie and her husband, Martin Mazurie, A. 8 through 10, 65; Pet. App. C., P. 33) Since 1969, the Mazuries operated the Blue Bull Bar on the deeded land owned by the corporation under the valid regulatory provisions of the laws of the State of Wyoming.

5. In April of 1972, after the enactment of Tribal Ordinance No. 26, federal Indian officers notified the officers and directors of the state corporation that they would be subjected to criminal prosecution regardless of the fact that they had a valid State liquor license and were operating on deeded lands under the jurisdiction and control of the State of Wyoming. In an attempt to obtain a tribal permit, the Respondents applied for a Tribal liquor license and were denied same. No procedures were available to the non-Indian applicant to make any appeal from the administrative determination of the tribal hearing nor was counsel for the Respondents, who appeared at the hearing, allowed to make a transcript or effect cross-examination. Since no transcript of the so-called "public hearing" was made, the record is, at best, sketchy as to what transpired. After denial of the Tribal liquor license, the Respondents, with no recourse to the Court for a review

of the proceedings, again opened the Blue Bull Bar and operated same under the provisions of their still valid and unquestioned State liquor license. Shortly thereafter, on June 13, 1973, federal officers seized and confiscated the alcoholic beverages and charged the Respondents with a criminal offense of introducing alcoholic beverages into Indian country in violation of 18 U.S.C. 1154, notwithstanding the existence of the valid State license. (Pet. App.C., P. 33; A71; , i)

6. Trial was held in the District Court without a jury. Ownership and management of the bar, the issuance of the patented fee without restriction, the terms and provisions of Tribal Ordinance No. 26, and the application for and denial of a Tribal license were stipulated by the parties. It was further stipulated that the Respondents were operating under a valid and current retail liquor license issued by the County Commissioners of the State of Wyoming, which had been issued each year by the State from 1954 through the present.

7. The evidence at trial demonstrated that:

(a) The Blue Bull Bar is located on fee-patented lands comprising a ten acre tract, same located approximately three-quarters of a mile from the nearest town of Fort Washakie, Wyoming. (A. 65, 31-32) Fort Washakie is an unincorporated town at which is the location of the headquarters of the Wind River Agency of the Bureau of Indian Affairs. At Fort Washakie, housing is provided for both Indian and non-Indian employees of the Wind River Tribes and the United States Government. (A.25, 69-70) The schools in the Fort Washakie area are organized as a regularly functioning school district of the State of Wyoming. (A. 21, 76)

(b) Housing surveys in the Fort Washakie area indicate that 41 of 170 families living in the area are non-Indian. (A.P.28) Of eleven business establishments operating within the town, eight are owned by non-Indians. (A. 31)

(c) One-fourth of the land in the Fort Washakie area is now fee-patented and under the jurisdiction of the State of Wyoming, (P.41)

(d) The State law enforcement officers have jurisdiction and authority to enforce criminal laws as to non-Indians on the Wind River Indian Reservation. (A.36) Non-Indians cannot be arrested under any ordinances enacted by the Tribal Council and the Superintendent of the Wind River Indian Reservation has no federal authority over deeded lands. (A.37-38, 42, 45, 55, 58, 61, 63, 76)

(e) All roads in the Fort Washakie area are controlled and maintained by the State of Wyoming. (A.40, 76) The State of Wyoming exercises tax authority over the patented lands located within the Fort Washakie area. (A.77, 19-24, 44)

(f) No boundaries can be drawn as to the Fort Washakie community. (A.38) There is no way to determine the boundaries of this community and no city, corporate, or governmental limits exist to define these boundaries. (A.39)

(g) There are no boundaries that can be defined as to the Indian community in the Fort Washakie area. (A.39, 49, 53, 58)

(h) There is no way that a boundary or a definition of an Indian community can be determined on the Wind River Indian Reservation. (A.39, 49, 50, Defendants' Exhibit "H", extracted P. 50, 53, 58)

(i) The State has assumed jurisdiction over non-Indians on deeded lands located within the exterior boundaries of the Wind River Indian Reservation, including private business regulation. (A. 38, 42, 45, 50, and Defense Exhibit "H", A-55, 58, 61, 63)

(j) The Respondents were acting in complete compliance with the laws of the State of Wyoming regulating the private business of a non-Indian corporation located on deeded land. (A.65, 77)

8. The equivalent "chiefs" of the respective tribes, now designated chairmen of the Joint Business Council, testified that they had lived on the Wind River Indian Reservation all of their lives and that there could be no boundaries defined where an "Indian community" begins or ends. Further testimony of the chiefs of the respective tribes indicates that they would say that it was Indian country only and that no boundaries can be drawn around an Indian community. In response to the counsel for the government's question concerning the terms "Indian country" and "Indian community", the response on record is "I would say it is not a community in the sense of a white community or anything else. This is related as Indian country, no boundaries." (A 53) Pertaining to the question of relinquished jurisdiction, general counsel for the Arapahoe Tribe, Mr. Wilkinson of Washington D. C., went on record stating "states normally do not exercise any jurisdiction within the exterior boundaries of an Indian Reservation without the express authority of Congress. States have jurisdiction over non-Indians within a reservation and where Congress has permitted land to enter fee status, the State has jurisdiction over the fee land." (A.50-51) (A.48-61)

9. On the basis of this record, the United States District Court for the District of Wyoming entered a finding that the Blue Bull was located in Indian country as defined in 18 U.S.C. 1151. The court did not, however, find that the Blue Bull Bar was located within an Indian community as required by statutes under which the Respondents were prosecuted, 18 U.S.C. 1154. An initial finding of the District Court indicated that the tribal ordinance requiring a tribal license had been violated and penal sanctions were applied to the non-Indian Defendants upon conviction.

10. On appeal, the matter was reversed and the conviction set aside. (487 F.2d 14)

11. The Court of Appeals held that the government had not met its burden of proof in this criminal prosecution by establishing beyond a reasonable doubt that the Respon-

dents were located within an "Indian community" as specifically required under the provisions of 18 U.S.C. 1154 (c), and went further to hold that the provisions of the statute, 18 U.S.C. 1154 (c) were vague and ambiguous in not providing for any definition of the term "non-Indian community". The Court of Appeals narrowed the issue as follows:

> "Thus, if it is assumed for the moment that the fee land in question is in 'Indian country' generally, the question whether the particular place was also in a 'non-Indian community' must be resolved if it can be. If the tavern was in a 'non-Indian community' in 'Indian country' no crime was committed. The statute does not refer to 'Indian communities' nor to 'non-communities' ".

12. The Court of Appeals found that the proof in the record of this element of the crime was inconclusive and indefinite.

13. The Court of Appeals further held that what constitutes a "community" for the purposes of the statute, 18 U.S.C. 1154(c) was not defined nor could it be clearly ascertained. That under these conditions, the business generally "could be either a federal crime or perfectly legal" and held that the statute was fatally defective by reason of the vagueness and indefiniteness of the terminology "non-Indian community".

14. The Court also addressed itself to the fundamental issue of whether or not the Indian tribes could regulate a non-Indian's business in such a way that "a failure to conform constituted a crime." The Court of Appeals expressed its concern over a governmental delegation to the tribes of an unrestricted power to determine whether or not the operation of a non-Indian's business constituted a federal crime or not and found that the reported delegation of authority to the Indian tribes in the context of its relationship with non-Indians on fee-patented lands who are unable to vote, be represented, or have access to the courts as provided by 18 U.S.C. 1161 was invalid.

15. In support of these contentions, the Court of Appeals suggested, by way of dicta, that Congress does not have the authority to regulate and control the sale of alcoholic beverages by non-Indian licensees of the State located on fee-patented land within the original external boundaries of an Indian reservation.

SUMMARY OF ARGUMENT

1. The Court of Appeals did not err in determining that the government failed in its burden of proof to establish that the Respondents' bar was located within an Indian community, which is a jurisdictional element of a prosecution under 18 U.S.C. 1154. The record is clear that there was no testimony establishing whatsoever that the tavern was in fact located within an Indian community as required by the terms of the statute. Further, the Court of Appeals was correct in holding that the terminology "non-Indian community" as found within the 18 U.S.C. 1154 is unconstitutionally indefinite and vague. The record amply demonstrates the difficulties that even the elders of the tribes had in defining what, if any, boundaries exist and what determines an Indian community. The statute, on its face, does not define the boundaries and, as such, is unconstitutionally void for vagueness under the guidelines prescribed by this Court. ***United States v. National Dairy Products Corp.***, 372 U.S. 29; ***Connally v. General Construction Co.***, 269 U.S. 385.

2. Although Article I, Section 8, of the Constitution authorizes Congress to regulate commerce "among several states and with the Indian tribes," this power may be relinquished to the states. The enactment of 18 U.S.C. 1161, August 15, 1953, terminated and delegated the federal control, sovereignty, and jurisdiction for the regulation of liquor trade on the Wind River Indian Reservation and vested same fully in the State of Wyoming. The subsequent enactment of a tribal ordinance some eighteen years after the termination of federal jurisdiction and regulatory control, did not and could not operate to terminate the jurisdiction then vested in the State of Wyoming as operative over non-Indians, citizens of the State of

Wyoming, living on deeded lands, who had been governed and regulated by the State of Wyoming for some eighteen years.

3. Although Congress has the power under Article I, Section 8, of the Constitution to regulate commerce among the sovereign states and with the Indian tribes, it does not have the constitutional authority to delegate regulatory powers with penal sanctions to tribal governments, allowing the tribal governments to enact ordinances with criminal penalties applicable to non-Indian fee-patented land owners who are not allowed to vote in the tribal council, who are not represented in the tribal council, who have none of the safeguards of the Federal Administrative Procedures Acts available to them, who have no recourse to the Courts for grievances from adverse decisions, and who are required to pay higher license fees than are required of Indian licensee applicants thereunder. In this regard, the issuance of a patent to a non-Indian operates to extinguish Indian title and jurisdiction over the lands in question as pertains to the control of liquor traffic, fully vesting this control and responsibility within the regulatory function and police power of the State of Wyoming where the constitutional safeguards of representation and due process are available to the citizens of Wyoming.

ARGUMENT

THE UNITED STATES FAILED TO MEET ITS BURDEN OF PROOF ESTABLISHING THAT THE GEOGRAPHICAL LOCATION OF THE RESPONDENTS' BAR WAS WITHIN AN "INDIAN COMMUNITY", WHICH IS A BASIC JURISDICTIONAL ELEMENT OF THIS CRIMINAL PROSECUTION UNDER 18 U.S.C. 1154.

The Court of Appeals held that:

> There are several inter-related conditions and definitions, referred to above, which must be established under the several sections of the statute for there to be a violation. For example, the place where the sale took place must be in

"Indian country," under 18 U.S.C. SS1154 and 1161, but not on "fee-patented" land in "non-Indian communities." Also, the sale must not be in "conformity" with the State laws and tribal regulations of the tribe "having jurisdiction" over the area of Indian country. 18 U.S.C. 1161. These definitions or requirements must be examined as a part of the crime charged . . . we are thus concerned with the elements of this crime . . . the geographical-land status terms and the substance and effect of tribal regulations thus becomes part of the elements of a crime, and, if not shown, the act was a legal one . . . the type of business engaged in by the Appellants is what has now become a regulated retail business which has been legalized by the United States and licensed under the laws of the State of Wyoming. Thus, the selling of liquor to Indians at a tavern licensed by the State is, of course, not a federal crime per se', but can become one under certain conditions, the definition of which, and the problem of proof of the existence of which, are hereinafter described . . . The proof in the record herein of this element of the crime is inconclusive and indefinite. It showed that the tavern was located from one-half to three-quarters of a mile from the Reservation's headquarters at Fort Washakie where there were located about eight business places. In the twenty square mile area surrounding the Agency, it was estimated that there were one hundred seventy Indian families. The witnesses called by the government were unable to identify any boundaries of Fort Washakie. Mr. Harris, Chairman of the Shoshone Business Council, testified that the place in issue was not an "Indian community" . . . All that the proof shows was that the location was probably not in

> an Indian community; however, the statute refers only to non-Indian communities. 487 F.2d 143 (Emphasis supplied)

Even a cursory examination of the record will verify what the Court of Appeals determined. The government could not carry its burden of proof and establish that the Blue Bull Bar was located within an Indian community. The government, in their brief, at page 13, admirably attempts to distinguish this failure of proof by the statement, "and if the Blue Bull is not in a 'community' at all for purposes of this exception, then it is equally clear that the exception is inapplicable and the general proscription governs." The fallacy of the government's position here is obvious; i.e., if the proof in the record cannot establish an Indian community at all, then the clear wording of the statute requiring this finding should be ignored and the general definition of Indian country as found in 18 U.S.C. 1151 should control.

On this question of statutory construction, the Court of Appeals reasoned that:

> The basic statute (18 U.S.C. 1154) originally made it a crime to sell liquor to certain Indians at any location or to introduce liquor into "Indian country". By subsection (c), it was then provided that "Indian country" as used in the section "*** does not include fee-patented lands in non-Indian communities.***" Thus if it is assumed for the moment that the fee land in question is in "Indian country," generally the question whether the particular place was also in a "non-Indian community" must be resolved if it can be. If the tavern was

[3]Contrary to the government's contention that the pertinent element of the crime in this prosecution was the term "Indian country" as found and defined in 18 U.S.C. 1151, the prosecution in this case was had under the provisions of 18 U.S.C. 1154(c) which requires, as the Court of Appeals held, that the government carry forth with proof of the fact beyond a reasonable doubt that the geographical site of the land in question was within an Indian community . . . Otherwise, the prosecution must fail as charged under the provisions of 18 U.S.C. 1154(c).

> in a "non-Indian community" in "Indian country," no crime was committed. The statute does not refer to "Indian communities" nor to non-communities. 487 F.2d 14 (Emphasis supplied)

18 U.S.C. 1154 was enacted in 1877 and the relevant provisions of the statute for the purposes of this appeal, subsection (c), was added in 1949. The 1949 Act of Congress more narrowly defined the term Indian country for the purposes of 18 U.S.C. 1154. The government's position on appeal is that the old definition of Indian country still prevails and controls prosecution subsequent to the effective date of the amendment. This is clearly contrary to the legislative intent of the Congress.[4]

Contrary to the position of the government in their brief, on page thirteen, to the effect that the District Court found that the Blue Bull Bar was not in such a community, the only finding in the record indicates that the District Court found that the Blue Bull Bar was located within "Indian country". No finding exists that the geographical situs of the bar was within "an Indian community". The government's brief and the position of the trial court was to place the burden of proof upon the Defendant to establish that in fact the bar was not located within an Indian community.

The government cites no case law for the proposition that if the proof of the existence of an Indian community does not exist and is not shown in the record, then this requirement, or element, of a criminal prosecution is

[4]Upon reading the provisions and definitions of "Indian Country" in 18 U.S.C. 1151 and then the more restrictive definition placed upon the term for the purposes of a criminal prosecution under the provisions of 18 U.S.C. 1154(c), it becomes quite clear that Congress intended to limit the applicability of the penal sanctions of Section 1154 to those areas which are Indian communities. The government's attempt to make this provision of the statute inapplicable to this criminal prosecution amply demonstrates the fallacy of that position. Should the general prescription of the definition of Indian country as found in 18 U.S.C. 1151 be the standard as argued by the government, then there would have been no need for the enactment of 18 U.S.C. 1154(c). The government's argument must fail in this regard and the record clearly establishes that the government could not sustain its burden of proof in establishing that the Blue Bull Bar was in fact located within an Indian community.

inapplicable and can be set aside. A reading of the applicable portion of the statute negates this proposition and demonstrates that this element must be proven and, in this case, was not.

18 U. S. C. 1154(c) reads as follows:

> The term "Indian country" as used in this section does not include fee patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands of rights-of-way in the absence of a treaty or statute extending the liquor laws thereto. (Emphasis supplied)

The criminal statutes are to be strictly construed. ***United States v. Enmons,*** 410 U.S. 396.

Obviously, the government and the trial court had no alternative but to attempt to shift the burden when the proof failed to establish the affirmative element. The Court of Appeals held:

> The statute was applied in the trial court, and here urged by the government, as containing a requirement, (being in a non-Indian community) to be demonstrated at trial by the Defendants. Placing such a burden on the Defendants was imporper. ***Gruenwald v. United States,*** 353 U.S. 391.

Accordingly, the government failed in its burden of proof at trial and must now fail on appeal.

THE TERMINOLOGY "NON-INDIAN COMMUNITY" AS FOUND IN 18 U.S.C. 1154 IS UNCONSTITUTIONALLY INDEFINITE AND VAGUE

Addressing itself directly to the problem of what is or is not an "Indian community", the Court of Appeals made the following analysis:

> "Thus, if it is assumed for the moment that the fee land in question is in 'Indian country,'

(as found by the District Court) generally, the question whether the particular place was also in a 'non-Indian community' must be resolved if it can be . . . The Reservation superintendent testified there were no community boundaries which could be defined . . . An examination of the record on this issue demonstrates that the inability of the witnesses to testify with specificity stems from the lack of any standards or any definition for the term . . . There is no standard provided as to what percentage of Indians or non-Indians is contemplated. Thus, if a given area can be selected as a 'community', the statute does not indicate that if there are more Indians than non-Indians, it becomes an Indian community, or what the 'community' is if there are a greater or lesser comparative number of Indians. The Act also does not state who is an Indian. There are acts for other purposes which use 25% Indian blood as a standard; others leave the test up to the tribe concerned. Thus, perhaps tribal membership is a test. However, if the 25% test is used, individuals who are 75% non-Indian could be counted to make up an "Indian community", but in any event, there is no guide as to this whatsoever.

It is also apparent that what constitutes a 'community' for this purpose is not defined nor can it be clearly ascertained. In an area where the defendants' bar was located, there were apparently some few scattered houses, although the record is not clear, but the witnesses did not have any standard on which to base their testimony. As mentioned, the nearby Fort Washakie had no definable boundaries, if it was a community, and the witnesses thus could not testify whether the bar was in it or not. There was thus no proof as to whether it

was in a community or not in one, or if in one, what kind. Again, the proof failed because the statute contains no reasonably ascertainably standards.

Under these indefinite and vague conditions, the business generally, or isolated transactions legal under state law, could be either a federal crime or perfectly legal. We must hold that the terminology of 'non-Indian community' is not capable of sufficiently precise definition to serve as an element of the crime herein considered, aside from other factors or elements with similar informities." 47 F.2d at 18

The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. ***United States v. Harriss,*** 347 U.S. 612, (1954); ***Bouie v. Columbia,*** 378 U.S. 347 (1964). The language of the statute must convey sufficiently definite warning as to the proscribed conduct when measured by the common understanding and practices of the local area. ***Roth v. United States,*** 354 U.S. 476, Reh Den 355 U.S. 852 (1957) The record clearly demonstrates the total lack of understanding and agreement within the Wind River Indian Reservation as to where boundaries of an Indian community lie. Not even the chiefs or elders of the tribes can draw that line and this line has not been able to be defined for over one hundred years. Coupled with this is the proposition that for over eighteen years the local practice has been that this business was perfectly legal under the laws and licensing provisions of the State of Wyoming and the same had become the local understanding and practice. The government's position on this point attempts to avoid the obvious effects of the statute by stating that after eighteen years of legality of operation under a license issued by the State and not revoked, a visit by federal officers and agents informing the Respondents that they were now in violation of some law does not correct the infirmity here.

This Court has held that the initial examination of the statute must necessarily be made "on its face" to determine whether or not specific and definable boundaries of criminal activity are prescribed. In determining the sufficiency of notice or warning contained in the statute the enactment must be examined in light of the conduct with which the defendant is charged. ***United States v. National Dairy Products Corp.,*** 372 U. S. 29. Under these standards. the wording of the statute must not require citizens to guess or speculate as to its meaning and must be standard enough so that persons of ordinary intelligence will not differ as to the application of the criminal prohibition. ***Connally v. General Construction Co.,*** 269 U. S. 385. After eighteen years of perfectly legal business activity, the Defendants are now charged with a crime. All of the preexisting licenses, valid as issued by the State, remain in force and effect. The crime charges them with doing business within an "Indian community" which for all the years prior to this time had been perfectly legal. No one can define where and what an Indian community is. The record itself demonstrates differences of opinion as to where the boundaries of criminal conduct lie here. The basic principle of due process is that an enactment is void for vagueness if its prohibitions are not clearly defined. ***Grayned v. Rockford,*** 408 U. S. 104. This Court has directed, in earlier decisions, that criminal statutes are to be strictly construed and any ambiguities found therein must be resolved in favor of lenity. ***United States v. Enmons,*** 410 U.S. 396. No individual conviction can be upheld unless the statute prescribes a fair warning that is given to the world in language that the common world would understand if a certain line is passed. ***Mourning v. Family Publication Service, Inc.,*** 411 U.S. 356.

The trial court did not make a finding of whether or not the area in question was "an Indian community". The witnesses, including the elders of the tribes and the superintendent of the Reservation, could not define or state what was an Indian community on this Reservation and where the boundaries thereof might be located with respect to

Respondents' geographical situs. The Court of Appeals could not find sufficient certainty and definitiveness in the statute when considered independently and coupled with the record of the proceedings had herein. The Court of Appeals did not err in finding that the statute is fatally defective by reason of its indefinite and vague terminology.[5]

THE ACT OF CONGRESS OF AUGUST 15, 1953, 67 Stat. 586, 18 U.S.C. 1161, TERMINATED FEDERAL PREEMPTION OF THE REGULATION OF LIQUOR ON THE WIND RIVER INDIAN RESERVATION AND VESTED SAME FULLY IN THE STATE OF WYOMING AND THAT THE SUBSEQUENT ENACTMENT OF TRIBAL ORDINANCE No. 26 DID NOT OPERATE TO TERMINATE THE JURISDICTION RELINQUISHED AND VESTED IN THE STATE.

The Congressional Enactment of 1953 operated to end federal pre-emption of the regulation of intoxicating liquors with the Indian tribes. The operation of 18 U.S.C. 1161 automatically excludes the criminal sanctions of 18 U.S.C. 1154, under which provision this prosecution was taken, if the act or transaction in question was legal under the laws of the state and consistent with an ordinance adopted by the tribe having jurisdiction over such area of Indian country.[6] Prior to the enactment of this statute, the federal government had totally pre-empted this field and the original provisions of 18 U.S.C. 1154 completely precluded the sale of any type of alcoholic beverage to a reservation Indian or the introduction thereof into Indian country. The statutory scheme was changed in 1953 when it became recognized that sales of liquor and alcoholic beverages to

[5]The analysis of the State of Wyoming is pertinent here in the context of the warnings given by federal officers:

> "If a statute is unconstitutionally vague, a request to comply with it, coupled with a threat of prosecution, is not going to correct or legitimize the constitutional infirmities." Amicus Brief, State of Wyoming, Pg. 4

[6]The question of whether or not the geographical situs of the Blue Bull Bar, Inc., was in such an area of Indian country as to confer jurisdiction for legislative purposes upon a tribal council is discussed later in this brief.

Indians could be carried out if done pursuant to the regulatory scheme of the state in which the reservation was situated. Should a local tribe decide that they wished the sales of liquor to be made available to their people, a local ordinance could then be enacted authorizing same and adopting the regulatory functions of the state. The tribes in question in this litigation, in 1953, did so act and conferred regulatory jurisdiction upon the State of Wyoming for all purposes of government. The state assumed this function and the Respondents' predecessor in title operated this establishment fully licensed and regulated by the State of Wyoming since 1954.

The control and supervision of alcoholic beverages is traditionally a function of the police power reserved to the states. ***South Carolina v. United States,*** 199 U. S. 437; ***Wilkerson v. Rahrer,*** 140 U. S. 545; ***California v. LaRue,*** 409 U.S. 109. This regulatory function of the state is properly vested within the local county officials in the State of Wyoming and the statutes of Wyoming contain every possible safeguard for the welfare of not only the Indian but also his non-Indian neighbor on the reservation.[7] The public health and welfare responsibilities are in practice strictly enforced.[8]

[7]Reference is made here to the Amicus brief filed on behalf of the State of Wyoming as to the administrative and due process safeguards built into the Wyoming statute.

[8]Upon advertisement of the annual renewal of the Blue Bull Bar license, and provisions for protest thereof, published in the local newspaper, a number of people protested the issuance of a renewal permit and the state authorities denied same. Most of the protestants were Indian people who, as citizens of the State of Wyoming, have direct access to this regulatory function. The Respondents speculate that the factual questions raised herein are moot now inasmuch as the state regulatory function, at this time, has afforded and accommodated the government's purpose in this prosecution.

This absolute power of the states to prohibit and regulate traffic in intoxicating liquors within the quarters of said state is not limited by the commerce clause. ***California v. LaRue,*** 409 U.S. 109 This broad grant of power to the states with the regulation of intoxicating liquors is further enhanced in this instance by the express delegation of authority by the Congress in the enactment of 18 U.S.C. 1161, providing for the state regulatory function to become complete in dealings with the Indian tribes. The power became vested in the state and numerous citizens, Indian and non-Indian, acted in reliance thereon, and are regulated effectively by the State of Wyoming under the provisions of the local statutes.

By the enactment of Tribal Ordinance No. 26, it all of a sudden became a crime for a non-Indian to engage in behavior licensed under the state. A dual licensing burden was placed upon a non-Indian. Numerous questions are presented by the enactment of Tribal Ordinance No. 26. These problems will be discussed in sequence in the remaining pages of this argument.

Whether or not Tribal Ordinance No. 26 was an effective enactment depends upon very difficult constructions of basic constitutional issues such as whether or not Congress can delegate its power to an Indian tribe to regulate non-Indians affixing penal provisions. In this context, the Court of Appeals indicated "the question is whether additonal licensing was required." This raises the issue of whether or not the tribes have the authority to regulate a non-Indian's business in such way that "a failure to conform constitutes a crime." The business was legal under the laws of the State of Wyoming and had been so for the past eighteen years. The tribal authorities, acting unilaterally, then imposed a dual licensing requirement upon non-Indians, living on deeded land. The penalty for failure to conform was a criminal prosecution regardless of the still existing and valid state license.

Although the Court of Appeals' statements are dicta, which need not be reviewed by this Court, the basic policy rational considering the relationships of the parties herein,

is sound in principle. The question utltimately revolves around the definition of "legislative jurisdiction" as found within the specific provisions of 18 U.S.C. 1161.

CONGRESS DOES NOT HAVE THE AUTHORITY TO DELEGATE ITS GENERAL REGULATORY POWER OVER COMMERCE WITH THE INDIAN TRIBES TO LOCAL VOLUNTARY TRIBAL COUNCILS ALLOWING THEM TO GOVERN NON-INDIAN LANDOWNERS AND THAT THE ISSUANCE OF A PATENT TO A NON-INDIAN TERMINATES LEGISLATIVE AND REGULATORY JURISDICTION OVER THE LAND IN QUESTION VESTING SAME FULLY AND COMPLETELY IN THE STATE OF WYOMING

The Court of Appeals was concerned with "relationships here concerned". The attempted delegation of a federal regulatory function to a local tribal council authorizes and allows that local council to determine and govern citizens of the United States that have no vote therein. Criminal sanctions are applied against people not represented in the tribal government nor having any say whatsoever in the enactment of ordinances which subject them to criminal prosecution. Likewise, the non-Indian defendants herein have no recourse to the courts for any administrative grievances.[9]

[9]The Court's attention is called to the case of Dry Creek Lodge et al. v. United States, C74-74, (USDC-Wyo.) now on appeal to the Tenth Circuit Court of Appeals. The position of the Indian Tribes in that particular litigation was that the federal court had no jurisdiction over any matter involving tribal affairs. The plaintiffs in that action then pursued a remedy in the state court and met again with the argument that a state court has no jurisdiction. The plaintiffs, non-Indians, have no standing in the tribal court for their grievances to be heard and are effectively denied a forum. Within the so-called "Indian country" of the Wind River Indian Reservation, approximately 25,000 people live and reside. Only 4,000 of these people are enrolled Indians and the power of the tribal council, based upon the position as taken by the government herein, could extend to each and every one of these people without representation. This is the type of relationship that the Court of Appeals was concerned with and disapproved of.

The tribes, in a sense, are voluntary in their membership inasmuch as unless an individual is enrolled within a certain prescribed time after his birth, he is not a member of the tribe. The Court of Appeals drew an analogy to the tribe as a landowner with the powers of same to govern and function as a governmental body pertaining to the tribal lands remaining under their jurisdiction. Indeed, 18 U.S.C. 1161 specifically attempts to authorize the tribal councils to enact ordinances pertaining to these intoxicating liquor questions and excludes the penal sanctions of the statute for those areas determined not to be "Indian country." In this context, the following principle applies:

> Simple criterion is that to all lands thus described it was Indian country whenever the Indian title has not been extinguished, and it continued to be Indian country so long as the Indian had title to it no longer. As soon as they parted with the title, it ceased to be Indian county, without any further act of Congress, unless by treaty which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case. ***Clairmont v. United States,*** 225 U.S. At 556.

These lands in question are deeded lands, patent having been issued by the United States, which patent was unrestricted as to any use restrictions placed against the land. The principle of Clairmont applies in the context of alcoholic beverage regulation, simply that where Indian title has been extinguished by the issuance of a patent, jurisdiction ends. The reason for the rule is obvious, inasmuch as the issuance of a patent takes the land in question out of Indian ownership and creates the possibility that non-Indian citizens may become title to the premises. These non-Indians have no voice in the tribal government and in order for the basic protections of the constitutional rights of citizens of representation and votes within their duly elected and constituted governments in access to the courts, the jurisdiction then vested for all purposes in the

state. This application of the disestablishment theory is necessitated in order to guarantee the basic rights and principles of equal protection and due process currently not available to non-Indians within the tribal councils.10

The Wyoming Supreme Court has followed this disestablishment theory in other cases involving criminal conduct on the Indian reservation, ***State v. Moss,*** 471 P.2d 33 (Wyo. 1970); ***Blackburn v. State,*** 357 P.2d 174 (Wyo. 1960), both holding for the proposition that once patent issues, title to the Indian lands and territory extinguishes federal jurisdiction. This proposition of extinguishment of regulatory police power jurisdiction has even been extended to allottees, citizens of the United States and subject to the police powers and laws of the state wherein they reside. The extinguishment of federal authority, and the derived tribal authority is extinguished for the purpose of the regulation of intoxicating liquors by the establishment and existence of an unrestricted patent. In re: ***Heff,*** 197 U. S. 488 (1905); ***U.S. v. Twelve Bottles of Whiskey,*** D.C. Montana 201 Fed 191 (1912) ***Evans v. Victor;*** 204 Fed. 361, Rev'g. 199 Fed. 504; ***Schaap v. U. S.,*** (CCA 8 1914) 210 Fed. 853; ***Royal Brewing Company v. Missouri, K. and T. Ry. Co.,*** (DC-Kan.), 217 Fed. 146; ***Rider v. LaClair,*** 77 Wash. 488, 138, Pac. 3.

[10]The record in this case demonstrates the defects. Non-Indians are required to pay higher license fees than Indians for the issuance of tribal permits. Although public hearings are allowed, the rights to counsel and the rules and regulations for the conduct thereof have not been prescribed, no transcripts taken of the proceedings, and there is no appeals provision to any court of competent jurisdiction. A non-Indian is called in before a tribal council consisting of people that he is not entitled to cast his franchise for and who are not answerable to him by election or otherwise. This is contrasted with the protections and safeguards available to Indians and non-Indians alike under the provisions of the Wyoming Administrative Procedures Act.

CONCLUSION

From this record, it is submitted that the government failed in its burden of proof to establish that the Respondents were operating in an "Indian community"; 18 U.S.C.A. 1154 is unconstitutionally void for vagueness; that Congress has effectively ended pre-emption of its regulatory powers under the commerce clause of the Consitution and vested same within the State of Wyoming and that the Wind River Indian Tribes attempt to require a second licensing procedure is beyond the tribal powers of sovereignty as pertains to non-Indians living upon patented lands over which federal legislative jurisdiction has been extinguished. For the foregoing reasons and upon these grounds, the judgment of the Court of Appeals should be affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN DeWALT MAZURIE, *et al.*,

Respondents.

MOTION OF SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER INDIAN RESERVATION, WYOMING, FOR LEAVE TO FILE BRIEF *AMICI* AND BRIEF *AMICI*

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Act of June 18, 1934, c. 576, sec. 1, 48 Stat. 984 9

Act of July 27, 1939, c. 387, sec. 5, 53 Stat. 1128 3

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1018

UNITED STATES OF AMERICA,

Petitioner,

v.

MARTIN DeWALT MAZURIE, *et al.*,

Respondents.

MOTION OF SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER INDIAN RESERVATION, WYOMING, FOR LEAVE TO FILE BRIEF *AMICI* AND BRIEF *AMICI*

The Shoshone Tribe of Indians and the Arapahoe Tribe of Indians of the Wind River Indian Reservation, Wyoming, move for leave to file the accompanying brief *amici* in support of the position of the United States.

In support of this motion, the Tribes show that they are the real parties in interest and that the decision below denies the protection of the Indian liquor laws to the Indians of the Wind River Reservation.

The Court is respectfully referred to the statement of the interest of the Tribes appearing at pages 1-2 of the accompanying brief.

Respectfully submitted,

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BRIEF *AMICI* OF THE SHOSHONE AND ARAPAHOE TRIBES OF THE WIND RIVER INDIAN RESERVATION, WYOMING

THE INTEREST OF THE TRIBES

The interest of the Tribes is to preserve the Tribes' sovereignty and rights of self-government over Indians on the reservation and to retain licensing control over the operations of bars and liquor establishments on all parts of the reservation, except fee land in nonIndian communities, and except rights-of-way traversing the reservation.

Over 83% of the reservation is held in trust for the Tribes (78.6%) and for individual Indians (4.6%). (App.,

pp. 1a, 2a, *infra.*)[1] The decision below opens the entire reservation to the sale of intoxicants without regard to the Tribes or their people. It denies the Tribes the protection of the Federal Indian liquor laws. Since the decision of the court of appeals, the Blue Bull bar has reopened; a bar has been relicensed and reopened in the Crowheart community of Indians; a bar has been licensed and opened in Burris also an Indian community and the local county commissioners have issued a liquor license for another bar to be opened at Burris. In addition, two licensed establishments are selling beer only, under State licenses issued by the local county commissioners. (App., p. 2a, *infra.*) All of these establishments are on fee land on the reservation. None is in a nonIndian community. All are operating without regard to the Tribes, the Indian people, or the Federal Indian liquor laws in force on all other affected Indian reservations in the United States.

STATEMENT

The United States established the Wind River Reservation by Treaty of July 3, 1868, 15 Stat. 673. Except for two portions of the reservation sold in 1872 and 1896, respectively, the treaty boundaries have not

[1] The acreages are set out in a letter dated March 28, 1974 from the Wind River Indian Agency printed in the Appendix to this brief and herein cited as "App., p.__, *infra.*"

Other references in this brief will be:

"R"—the one-volume record on appeal, a copy of which the United States lodged with the Clerk; and "Tr."—the one-volume transcript of trial proceedings a copy of which the United States lodged with the Clerk.

changed.[2] Today the reservation contains about 2,268,000 acres. Only about 10.1% is owned in fee—mostly by nonIndians. The remainder is held in trust for the Tribes (78.6%), or for individual Indians (4.6%), or is owned by the United States (6.7%). (App., pp. 1a, 2a, *infra.*)[3] Unlike most Indian reservations, the Wind River reservation is a fairly solid block of tribal land. It was not a serious victim of the allotment system, later discussed (*infra.* pp. 8-9).

The reservation headquarters are at Fort Washakie, no doubt established initially as a military fort, now the seat

[2] Act of December 15, 1874, 18 Stat. 291 (700,642 acres), *Shoshone Tribe v. United States*, 3 Ind. Cl. Comm. 313, (Fdg. 3(1), p. 314) (1954); Act of June 7, 1897, c. 3, sec. 12, 30 Stat. 62, 63 (55,040 acres), *Shoshone Tribe v. United States*, 82 C.Cl. 23, Fdg. 14, p. 47 (1935), reversed for error in the measure of damages, *Shoshone Tribe v. United States*, 299 U.S. 476. A brief history of the reservation is found in the opinions of this Court and of the court of claims. In 1905 there was a cession in trust opening a portion of the reservation for sale with the proceeds to be credited to the Tribes. Act of March 3, 1905, c. 1452, 33 Stat. 1016 (1,480,000 acres), but substantially all of this was restored to the Tribes by the Act of July 27, 1939, c. 387, sec. 5, 53 Stat. 1128, 1129 (25 U.S.C. 575). The Blue Bull is not on the portion of the reservation affected by the 1905 Act.

[3] The court below observed that "roughly one-fifth of the Reservation" was in fee. (487 F.2d 15.) One-tenth would be more accurate.

The court below also stated that the reservation included "large tracts of Government land" (*idem*, p. 16). Of course, "large tracts" is a relative term but as employed below the phrase might well convey the wrong impression. The Government owns about 152,530.54 acres, practically all in the federal reclamation projects, and the minerals underlying substantially all of the Government's lands are held in trust for the Tribes. Act of August 27, 1958, c. 487, 72 Stat. 935. (Appendix pp. 1a, 2a, *infra.*)

of tribal government. The governing bodies are the Shoshone Business Council and the Arapahoe Business Council, acting under delegated authority from the people of the respective Tribes. (Tr. 96, 97.)

The reservation headquarters include the principal Federal agencies serving the Indian people,—the Bureau of Indian Affairs and the Indian Health Service. The main structures are those housing the Indian Agency offices and shops for Bureau programs, the Indian Health Service clinic and offices, the tribal court, police department and jail, a postoffice, the Tribes' office complex, the Shoshone community center and 49 housing units for federal employees. There are two tribal housing developments with 58 units all occupied by Indians. (App., pp. 2a, 3a, *infra*.)

In the direction of the Blue Bull there are two businesses within 0.7 mile of the Wind River Agency and postoffice, both on nontrust land and both owned by nonIndians. One sells beadwork and Indian handicraft, the other is the Blue Bull. In the opposite direction, about 0.9 of a mile from the postoffice on the main highway is a small motel and trailer court operated by an Indian on trust land. Further on down the main highway, about 1.3 miles from Fort Washakie, is a general store, an auto service station and two self-service laundries. (App., p. 3a, *infra*.)[4]

[4] The court below stated that the proof showed that the Blue Bull "was located from one-half to three-quarters of a mile from the Reservation headquarters at Fort Washakie where there were located about eight business places." (487 F.2d 17.) There are no business places at reservation headquarters. The Blue Bull and the beadwork store 0.7 of a mile from the Agency may be part of the Fort Washakie community but whether the other five business places are part of that community is not clear from the record.

There are no schools, no banks, and no stores or other business places in the Fort Washakie community, unless the bead and handicraft outlet and the Blue Bull are treated as part of the community.

If there is a fire, the Bureau of Indian Affairs' fire equipment responds. There is no other fire department. If there is an offense by an Indian, the tribal police and the tribal courts operating under tribal laws are called upon. There are no other police or courts. The Bureau of Indian Affairs owns the water plant and furnishes domestic water to all in the area, including the Blue Bull. The Bureau of Indian Affairs owns the fire truck and fire-fighting equipment and equips and maintains the volunteer fire department that services the area. (App., p. 3a *infra*.) For all practical purposes, no public services are furnished by anyone except the Bureau of Indian Affairs and the Tribes.

The Blue Bull liquor bar is located, as described above, on a tract of fee land on the reservation. Federal law prohibits the sale of intoxicants on "all land", fee or trust, in Indian country, but the prohibition does not extend to fee land in nonIndian communities on the reservation, or to rights-of-way on the reservation. The statutory prohibition is lifted only if the sale of intoxicants conforms both with State law and an ordinance adopted by the affected tribe, certified by the Secretary of the Interior, and published in the Federal Register. (18 U.S.C. 1151, 1154, 1161.)

The Wind River Tribes, by ordinance duly certified and published, elected to permit the sale of intoxicants by its licensees. Respondents were denied a tribal liquor license to operate a bar located on a tract of fee land in Fort Washakie, or in the vicinity of Fort Washakie, the reservation headquarters. Nevertheless, the respondents'

operated the Blue Bull and sold liquor to Indians and others. Then followed the conviction by the district court, without a jury.

The court of appeals reversed. We read the opinion to stand for the broad proposition that "Indian country", as used in the Indian liquor laws, does not include fee land.

To reach this conclusion, the court of appeals struck down as unconstitutional two major segments of the Indian liquor laws. One, when it ruled that the statutory phrase "nonIndian communities" was so vague as to violate the Constitution. (487 F.2d 17-18.) The other, when it ruled that Congress unconstitutionally delegated its powers to legislate when it conferred the right of local option on Indian tribes (*idem.* p. 18).

The court of appeals also rejected the statutory definition of "Indian country", as interpreted by this Court, and excluded fee land from "Indian country" (487 F.2d 18.) Finally, the court, by way of dictum, employed language that would strip Indian tribes of their sovereign attributes and rights of self-government and downgrade them to "an association of citizens", a "private, voluntary organization". (487 F.2d 19.)

ARGUMENT

I.

THE HISTORY OF THE INDIAN LIQUOR LAWS CONFIRMS THE CONGRESSIONAL INTENT TO CONTROL INTOXICANTS ON THE RESERVATION WITHOUT REGARD TO LAND TENURE, EXCEPT IN NONINDIAN COMMUNITIES AND ON RIGHTS-OF-WAY.

The history of governmental control of liquor in relation to Indians anywhere in the United States, and in relation to all persons in Indian country goes back to

Colonial times. Felix S. Cohen, "an acknowledged expert in Indian law",[5] reports that the initial Federal laws on the subject were motivated in part by the pleas of Chief Little Turtle who spoke to President Thomas Jefferson on January 4, 1802, as follows (*American State Papers*, Vol. 7 (1789-1815), p. 655 cited in Cohen, Felix S., *Handbook of Federal Indian Law*, p. 352 (GPO 1945)):

> ***But, father, nothing can be done to advantage unless the great council of the Sixteen Fires, now assembled, will prohibit any person from selling any spirituous liquors among their red brothers.
>
> * * * * * * * * *
>
> Father: Your children are not wanting in industry; but it is the introduction of this fatal poison which keeps them poor. Your children have not that command over themselves, which you have, therefore, before anything can be done to advantage, this evil must be remedied.

That same year, President Jefferson recommended, and Congress enacted, legislation to regulate the liquor traffic among Indians. Act of March 30, 1802, sec. 21, 2 Stat. 139, 146. And the regulation of liquor traffic in Indian country has been a subject of Congressional concern ever since.[6] Commencing in 1832, there followed a series of

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[5] *Squire v. Capoeman*, 351 U.S. 1, 8-9 (1956). "We refer to Cohen on Indians as we would to Wigmore on Evidence." *Capoeman v. United States*, 194 C.Cl. 664, 670 (1971). Also, *United States v. Native Village*, 188 C.Cl. 1, 12 (1969).

[6] The authority of Congress is derived from the Constitutional power to regulate commerce among the Indian tribes and from the treaty-making power. (Article I, Section 8, Clause 3; Article II, Section 2, Clause 2.) *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 172, n. 7 (1973). That this power is supreme and

federal statutes that in general, prohibited the sale of liquor to Indian wards anywhere in the United States and wholly prohibited liquor in Indian country.[7] The meaning of Indian country as used in the Indian liquor laws, initially presented little difficulty. With few exceptions, Indian reservations were solid blocks of tribal land. And the leading decisions on the point early ruled that "Indian country", as used in the liquor laws, meant land where Indian title had not been extinguished. *Bates v. Clark*, 95 U.S. 204, 207-208 (1877); *United States v. Bris*, 121 U.S. 278 (1887).

But the definition that omitted fee land from Indian country, failed to meet the need after the Government aggressively implemented the allotment system dividing the reservations into individual holdings as a means, in the words of a Commissioner of Indian Affairs, of carrying out "the settled policy of the Government to break up reservations, destroy tribal relations, settle Indians upon their own homesteads,***. The American Indian is to become the Indian American." *Handbook of Federal Indian Law, supra*, p. 23.

Commencing in the late 1880's, portions of reservations were broken into individual allotments on a wholesale scale, mainly under the General Allotment Act

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all-inclusive is no longer open to debate. *United States v. Holliday*, 3 Wall. 407, 418 (1866). As stated in *United States v. Nice*, 241 U.S. 591, 597 (1916): "The power of Congress to regulate or prohibit traffic in intoxicating liquor with tribal Indians within a state, whether upon or off an Indian reservation, is well settled."

[7]Most of the statutes are collected in Cohen, *Handbook of Federal Indian Law, supra*, p. 354, n. 35. Cohen identifies the "most important of these measures" as the Act of July 23, 1892, c. 234, 27 Stat. 260, as amended.

of February 8, 1887, c. 119, 24 Stat. 388.[8] In addition, during the period 1890-1916, the Government sold tribal lands not needed for allotments to homesteaders and others, donated such lands to the states and set them aside for townsites, with the proceeds of the dispositions credited to the tribes, pursuant to"cession in trust" agreements between the tribes and the United States, or by statute without tribal consent.[9] Thus, tribal land passed into fee status by transfer to nonIndians, by allotment to individual Indians from whom it passed out of trust status by approved sale, by forcing a fee patent on the Indian without his consent,[10] and by heirship.

The allotment and sale of reservation land resulted in tracts of fee land distributed through the reservations and the creation of small rural towns to serve the homesteaders. Under the decisions, such fee lands were not Indian country for purpose of the liquor laws. (See p. 8, *supra*.) The sale of liquor on small islands of fee land in the midst of Indian country tended to defeat the acts of Congress regulating liquor traffic on Indian reservations.

To cure the situation, Congress, in 1948, defined Indian country by statute to include "all land" in an

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[8]Allotments reduced Indian landholdings from 138 million acres in 1887 to 48 million in 1934, when allotments were halted. Act of June 18, 1934, c. 576, sec. 1, 48 Stat. 984, 25 U.S.C. 462. Cohen, *supra*, p. 216.

[9]Examples of such "cessions in trust" are the subject of this Court's decisions. *United States v. Minnesota*, 270 U.S. 181, 210 (1926); *Morrison v. Work*, 266 U.S. 481, 483 (1925), and *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920). See discussion in Cohen, *Handbook of Federal Indian Law, supra*, pp. 334-336.

[10]The "forced patent" practice evoked the Act of February 26, 1927, c. 215, 44 Stat. 1247. See *Board of Com'rs of Caddo County, Okl. v. United States*, 87 F.2d 55 (C.A. 10, 1936).

Indian reservation, both fee and trust, and all rights-of-way.[11] This 1948 statutory definition permitted unobstructed control of liquor on Indian reservations, without regard to land tenure. But small towns, with predominantly nonIndian populations, located on Indian reservations, complained that the statutory definition was too broad. Prior to the 1948 Act definition, establishments in such towns had been selling liquor on fee land, in reliance on the pre-1948 Act court rulings that fee land on an Indian reservation was not Indian country. The towns wanted that privilege reinstated.

Congress responded by a 1949 amendment that changed the 1948 definition of Indian country to exclude from the prohibitions of the Indian liquor laws, "fee-patented land in nonIndian communities or rights-of-way through Indian reservations***." Act of May 24, 1949, c. 139, sec. 27, 63 Stat. 94 (18 U.S.C. 1151, 1154(c)).

Four years later, Congress wiped out the racially discriminatory prohibition that barred the sale of intoxicants to Indian wards anywhere in the United States. Act of August 15, 1953, c. 502, sec. 2, 67 Stat. 586, (18 U.S.C. 1161). At the same time, Congress granted local option to tribes in Indian country by directing that the Federal Indian liquor laws should not apply "within any area of Indian country" if the liquor transactions were conducted "in conformity" both with State law and a tribal ordinance. In other words, at the option of the

[11] Act of June 28, 1948, c. 645, 62 Stat. 758: "The term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,***."

Tribes, the prohibitions and penalties of the Federal Indian liquor laws could be lifted to allow the introduction and sale of intoxicants on the reservation.

When tested against this historical background, it becomes apparent that the decision below is a grossly erroneous departure from long-standing Federal law and defeats the policy of Congress to regulate the liquor traffic with Indians in Indian country.

II.

THE DECISION OF THE COURT OF APPEALS IS IN GROSS CONFLICT WITH THE HISTORY AND PURPOSE OF THE INDIAN LIQUOR LAWS.

Viewed in the context of history, the decision below is almost inexplicable. The Blue Bull concededly was on the reservation. Either it was a part of the Fort Washakie community,—the reservation headquarters, or it was near that community, but off by itself. (In the words of one of the respondents: "***we are kind of out there by ourselves, you know" (Tr. 114).)

To void the judgment of conviction the court of appeals struck down as unconstitutionally vague, the "non-Indian communities" feature of the 1949 Act and struck down as an unconstitutional delegation of legislative power, the local option provision of the 1953 Act. The elimination of these provisions returned the law to its status before the 1949 Act, when the sale of liquor was prohibited on "all land" in Indian country. This left the Blue Bull in violation, unless fee land on the reservation was not Indian country.

Congress had defined Indian country to include "all land" on an Indian reservation (18 U.S.C. 1151), and this Court had interpreted "all land" to mean fee as well as trust land. *Seymour v. Superintendent*, 368 U.S. 351,

358 (1962). Under the court of appeals' rationale, with the "nonIndian communities" and local option provisions eliminated, *Seymour* should have compelled in affirmance of the conviction. But the court of appeals departed from the statutory definition and from *Seymour*, and redefined "all land" to mean "all trust land", thus freeing the Blue Bull to sell liquor on fee land on the reservation without violating the law. (487 F.2d 18.)[12]

Perhaps to bolster the fragile basis for its holding, the court of appeals went on to strip the Tribes of their limited attributes of sovereignty and downgrade them to a "private, voluntary organization" that happened to own land. (487 F.2d 19.) The court of appeals was wrong on all points.

A. The court of appeals erred when it struck down as unconstitutionally vague the "nonIndian community" feature of the 1949 Act.

The court of appeals paid no heed to "the strong presumptive validity that attaches to an Act of Congress", or to this Court's consistent effort to interpret statutes so as to sustain constitutionality. *United States v. National Dairy Prod. Corp.*, 372 U.S. 29, 32 (1963).

This is not a case of a vague law trapping the innocent, or opening the door to arbitrary and discriminatory enforcement, or where the statute "is void for vagueness

[12]This even though the court of appeals, at least twice before, had followed *Seymour's* holding that fee land on a reservation was Indian country. *Ellis v. Page*, 351 F.2d 250, 252 (1965); *Hilderbrand v. Taylor*, 327 F.2d 205, 206-207 (1964), certiorari denied 366 U.S. 932.

if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Here liquor traffic was prohibited in all "Indian country"—as that term was defined by statute. The penalties were removed only if the traffic took place within the exceptions (Indian communities or rights-of-way) to the all-inclusive definition, or if the Tribes consented by ordinance. There is nothing vague about the prohibition.

This is a case where a "person of ordinary intelligence" (408 U.S. 108), would have no difficulty in knowing whether the Blue Bull was in a nonIndian community. Significantly, the court of appeals itself, had no difficulty in declaring that the "term 'nonIndian community' could apply to towns such as Riverton which is located within the exterior boundaries of the Wind River Reservation***" (487 F.2d 17). If the term were as vague as declared below, from what source did the court of appeals gain the confidence to volunteer that Riverton, a town on the reservation, could be a nonIndian community. Although there was no reason to mention Riverton, and it was not considered in the record in this case, we agree that Riverton, with a 1970 population of 7,995, is a nonIndian community.

Certainly, as the court of appeals has demonstrated, the application of "ordinary intelligence" permits one to distinguish between Riverton and Fort Washakie, the reservation headquarters. The same kind of "ordinary intelligence" would inform the Blue Bull's owners that the site of their liquor bar was not a nonIndian community, situated as the bar was off by itself, about 1/2 to 3/4 mile from the tribal and agency headquarters on a reservation 83% held in trust. (See *supra*, p. 1.)

The meaning of the term "nonIndian community" certainly is no less susceptible of determination by the

application of "ordinary intelligence", than are the terms "Indian country" repeatedly defined in the decisions, or the term "dependent Indian communities" included in the definition of Indian country (18 U.S.C. 1151(b)) and defined by this Court and the court of appeals. *United States v. McGowan*, 302 U.S. 535, 538-539 (1938); *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *United States v. Martine*, 442 F.2d 1022, 1023 (C.A. 10, 1971). These cases, including the opinion of Judge Seth in the *Martine* case, emphasize that when necessary to define terms in the Indian liquor laws the judicial approach should be one that will carry out the "policy of Congress, uniformly enforced through the decisions of this Court,*** to regulate the liquor traffic with Indians occupying such a settlement [colony of Indians on 28 acres of land owned by the United States]." *United States v. McGowan, supra*, p. 538.

Indeed, "nonIndian community" is less difficult to define because it permits comparison to an "Indian community". The differences between two such communities are patent as underscored by the court below when it pointed to Riverton as a nonIndian community. (487 F.2d 17.)

B. The court of appeals erred when it struck down as unconstitutional, the local option feature of the 1953 Act.

As part of the Federal design for controlling intoxicants on Indian reservations, Congress prohibited the sale of liquor on the reservation (18 U.S.C. 1154), and in 18 U.S.C. 1161, permitted tribes to decide for themselves whether they wanted liquor on the reservation. There is no validity to the ruling below that this local option feature of Section 1161 was an unconstitutional dele-

gation of legislative power. What Congress did is substantively the same as the common local option provisions of state laws allowing each county and town to decide for itself whether the general prohibition of the liquor laws should be lifted. No delegation of the Congressional power is involved. See *Federal Power Commission v. New England Power Company*, 415 U.S.,__, n. 1 of concurring opinion (1974).

The court of appeals conceived that the local option feature of Section 1161 delegated to the Tribes the "unrestricted power" to convert what was legal, into a criminal act. (487 F.2d 18.) The opposite is true. The local option feature authorized the Tribes to terminate the Federal prohibition, and make legal what was otherwise illegal. Federal law (18 U.S.C. 1154) prohibits the sale of liquor on the reservation. The Blue Bull could not lawfully be in business, and in fact, did not go into business, until after Section 1161 was enacted and the Tribes, in the exercise of local option, adopted an ordinance in 1953 terminating the Federal prohibition. (R. 74.) But if the court of appeals is right, and local option is a nullity, then the tribal ordinance lifting the Federal prohibition is void, and the Blue Bull is in violation.

The decision below would unnecessarily limit Congress in developing legislation essential for the administration of Indian affairs and necessary to carry out Federal policies that give recognition to the wishes of the Indian people in their own country and to rights of tribal self-determination consistently recognized by the United States. Certainly, Congress could have vested in the Secretary of the Interior the decision of whether liquor should be permitted on the reservation, or it could have placed the decision in the hands of a local court (Cf. *United States v. Hellard*, 322 U.S. 363 (1944), where a

local county court was designated by Congress to fill the function of the Secretary in approving or disapproving alienations of trust land), or it could have left the decision to the Indian people affected, as it did in Section 1161. In each instance an administrative function is performed. In no instance is there a delegation of the power of Congress to legislate.

The matter of liquor on an Indian reservation is peculiarly one of local choice. Here that choice was left to the Tribes as part of the deliberate intent of Congress to recognize the principle of self-government, as evidenced by the legislative history of Section 1161. S. Rept. No. 722, 83d Cong., 1st sess. (1953); H. Rept. No. 775, 83d Cong., 1st sess. (1953). See letter set out in 78 I.D. 39, 42. This too is the view of the Department of the Interior. 78 I.D. 39, 41-42 (1971).

C. The court of appeals erred when it redefined Indian country and departed from this Court's decision in Seymour v. Superintendent, 368 U.S. 351 (1962).

The term "Indian country" is defined in the 1948 Act (18 U.S.C. 1151) as "all land within the limits of any Indian reservation *** notwithstanding the issuance of any patent, ***." In *Seymour*, this Court rejected the contention that "all land" meant "all trust land" and held that it meant all land, fee and trust. (368 U.S. 358.) If *Seymour* controls, the Blue Bull was in violation since it was on fee land on an Indian reservation without a tribal license—the court of appeals having already destroyed the "nonIndian communities" exception by declaring it unconstitutionally vague (pp. 9-11, *supra*).

The court of appeals undertook to distinguish *Seymour* on an ad hoc basis, saying that *Seymour* involved a

conflict between state and federal jurisdiction calling for a broad interpretation, whereas cases relating to the control of liquor among Indians presented "no policy or need for a broad interpretation of 'Indian Country' ". (487 F.2d 18.) Even if we assume that "broad interpretation" correctly characterizes the *Seymour* construction of "all land", the court of appeals has raised an irrelevant distinction refuted by 170 years of consistent Federal interest in the control of intoxicants in Indian country.

In making the distinction between broad and narrow interpretations, the court below overlooked the fact that while the Indian criminal laws have application only on reservations, the Indian liquor laws, before the 1953 Act, made it a crime to sell liquor to Indians anywhere in the United States. (See p. 8, *supra*.) This is powerful proof that the Government's concern over Indians and liquor, was ubiquitous and not limited to the reservations. Nothing in this background suggests that when Congress in 1953 (18 U.S.C. 1161), eliminated the discriminatory off-reservation prohibition and simultaneously defined Indian country to include "all land", it intended that phrase to be narrowly construed, rather than broadly construed to accomplish the remedial objective of the legislation.

D. The court of appeals erred in equating Indian tribes with citizens' associations.

The court below expressed the view that essentially an Indian tribe is nothing more than "an association of citizens", a "private, voluntary organization" (487 F.2d 19). These views, if valid would strip tribes of their attributes of sovereignty

Of course, the court's viewpoint is nothing less than an abandonment of 140 years of Indian law, extending from *Worcester v. Georgia*, 6 Pet. 515 (1832) to *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973). This line of cases holds that by reason of their sovereign attributes, Indian tribes and their people on the reservation are free from state law, subject always to the power of Congress. Also, *Warren Trading Post v. Arizona Tax. Com.*, 380 U.S. 685 (1965); *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Williams v. Lee*, 358 U.S. 217 (1959).

The court of appeals did not justify its extreme position. This Court's landmark decisions concerning tribal sovereignty were not discussed. However, the court of appeals did reject the decision sustaining tribal sovereignty in *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (C.A. 8, 1956), on the ground that the case did not deal with nonIndians but with "the assertion of tribal authority over members of the Tribe and this only." (487 F.2d 19.) The court below did not correctly read the case in question.

Iron Crow concerned the validity of a tribal ordinance under which a tax was imposed on plainfiffs' "*non-members* of the*** Tribe". (231 F.2d 90, emphasis in the original.) In *Iron Crow*, the court held that "[I]nasmuch as it has never been taken from it, the defendant Oglala Sioux Tribe possesses the power of taxation which is an inherent incident of its sovereignty." (*Idem*, p. 99.) To the same effect, *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (C.A. 8, 1958), certiorari denied 358 U.S. 932. The power to tax as an attribute of tribal sovereignty is hardly distinguishable from the power to license. The court of appeals misread *Iron Crow*. The decision below stands as a sore-thumb exception to extablished law.

Observations that downgrade an Indian tribe to a "an association of citizens" and to a "private, voluntary organization" ordinarily flow from nonfederal sources. Over the years, Indians have learned to recognize such comments as the prelude to action that would deprive them of a right, or a privilege, or property. Comparable attitudes evoked expressions of federal concern for the Nation's tribal wards such as are found in *United States v. Kagama*, 118 U.S. 375, 379-380, 384-385 (1886), and similar cases. While nonIndian neighbors may no longer be a physical threat, there remains the unhappy fact that local residents too often regard reservation Indians as legitimate prey. Unfortunately, local public opinion is indifferent to the Indians' needs, to their complaints, or to the wrongs perpetuated on them. Judicial observations, such as those noted, exacerbate an uneasy situation.

CONCLUSION

The decision below departs from established law and frustrates the sedulous policy of Congress with respect to the regulation of liquor traffic in Indian country. If permitted to stand, the decision will lead to damaging and mischievous results on Indian reservations. The decision should be set aside.

Respectfully submitted,

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Attorney for the Arapahoe Tribe of Indians

APPENDIX A

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WIND RIVER INDIAN AGENCY
FORT WASHAKIE, WYOMING 82514

IN REPLY REFER TO:
Administration
004

March 28, 1974

Mr. Marvin J. Sonosky
2030 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Sonosky:

This letter is in response to your request of March 26 for the information covering the ownership of the reservation, total number of Indians living on the reservation and liquor or beer licenses issued and in effect on the Wind River Indian Reservation and related information.

The following is the breakdown of the acreage as to the ownership of the reservation which we show as Tribal (trust land owned by the Shoshone and Arapahoe Tribes), Allotted (trust land owned by individual Indians), Fee (land removed from trust status which is presently taxable), and Government (owned by the United States and administered by Bureau of Reclamation or Bureau of Indian Affairs).

PORTION OF RESERVATION AFFECTED BY ACT OF MARCH 3, 1905 (33 STAT. 1016)

ALLOTTED	10,214.48
GOVERNMENT	151,234.39
FEE	190,416.81
TRIBAL	1,120,978.35
TOTAL	1,472, 844.03

PORTION OF RESERVATION *NOT* AFFECTED BY ACT OF MARCH 3, 1905 (33 STAT. 1016)

ALLOTTED	95,127.16
GOVERNMENT	1,296.15
FEE	38,644.73
TRIBAL	660,095.96
TOTAL	795, 164.00

TOTAL ACREAGE IN RESERVATION: 2,268,008,03

The total number of Indians residing on the entire reservation as compiled by our office is 4,538.

There have been six liquor and/or beer licenses issued through the Fremont County offices on the reservation (excluding the City of Riverton) which are currently in effect and they are listed as follows:

1. Blue Bull Bar, Fort Washakie - Liquor, State Licensed.
2. Harold Campbell, Fort Washakie - Beer, State Licensed.
3. Red Rock Lodge, Burris - Liquor, State Licensed.
4. Dry Creek Lodge, Burris - Liquor, State Licensed.
5. Crowheart Store, Crowheart - Beer, State and Tribal Licensed.
6. Presgroves Bar, Crowheart - Liquor, State Licensed.

The above listed establishments received their state licenses subsequent to the 10th Circuit Court of Appeals decision filed November 8, 1973.

The community of Fort Washakie includes the Bureau of Indian Affairs offices and appurtenant shops for BIA programs; United States Public Health, Division of Indian Health Clinic; Law and Order facilities; Tribal Office Complex; Shoshone Community Building and 49 federal

housing units for employees working for the Bureau of Indian Affairs and Public Health Service. Two housing developments totaling 58 units constructed and administered by the local Tribal Housing Authority are occupied entirely by Indians. The Bureau of Indian Affairs owns and operates the only community water service for the Fort Washakie area. The water service supplies 203 user units including the local school, the Blue Bull Bar and all other businesses mentioned in this correspondence. There are two business establishments within 0.7 mile of the Wind River Agency and the Fort Washakie Post Office that are on non-trust taxable property. They are the Fort Washakie Trading Co., owned by R.V. Greeves, a non-Indian, selling beadwork, southwest silver and turquoise jewelry about 0.4 mile from the agency compound and about 0.7 mile west of the Fort, the local liquor outlet listed as the Blue Bull Bar. Located 0.9 mile south of the Post Office, on the main highway, there is a five-unit motel with ten trailer spaces operated by an Indian on trust land. There is a general store, auto service station and two self-service laundries located 1.3 miles south of Fort Washakie. The area as described is serviced by a volunteer fire department equipped and maintained by the BIA and the large fire truck is limited to service only the Bureau of Indian Affairs, Public Health Service, Tribal Offices and Housing where hydrants have been installed. Fire suppression equipment for range and rural fires is used for fires not serviced by fire hydrants which includes the Fort Washakie Trading Co. and the Blue Bull Bar.

Sincerely yours,

/s/ Clyde W. Hobbs
Clyde W. Hobbs
Superintendent

Supreme Court, U. S.
FILED
SEP 13 1974
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

NO. 73-1018

UNITED STATES OF AMERICA,
Petitioner,

vs.

MARTIN DeWALT MAZURIE, ET AL.,
Respondents.

BRIEF OF THE STATE OF WYOMING AS AMICUS CURIAE IS SUPPORT OF JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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COUNSEL FOR AMICUS CURIAE

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CITATIONS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

NO. 73-1018
UNITED STATES OF AMERICA,
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MARTIN DeWALT MAZURIE, ET AL.,
Respondents.

BRIEF OF *AMICUS CURIAE* STATE OF WYOMING

INTEREST OF THE STATE

The State of Wyoming, for the protection of the welfare, health, peace, morals and safety of the people of Wyoming, has provided for the regulation of all spirituous, fermented and malt liquors sold within the boundaries of the State. (Laws 1935, ch. 87 §1; C.S. 1945 §53-201; C. S. 1957 §12-1). The regulatory scheme for alcoholic beverages is found in §§12-1 through 12-46, Wyoming Statutes, 1957, 1973 Cum. Supp. Under the provisions of the Wyoming Alcoholic Beverages Act, any qualified person may apply for a license to sell liquor, but the number of licenses issued within any one city, town or county is limited by statute. (§12-6, Wyoming Statutes, 1957, 1973 Cum. Supp.). Upon successful application, the licensee is given a "personal privilege" entitling him to sell liquor for one year; thereafter, the license must be renewed annually. (§12-13, Wyoming Statutes, 1957).

The Wyoming Alcoholic Beverages Act further provides for the protection of those within the State by providing for the license to be suspended or revoked through a court action brought in the name of the State of Wyoming by the attorney general, or any county or prosecuting attorney or through a hearing procedure before the Wyoming Liquor Commission, both actions being subject to a later appeal. (§12-29, Wyoming Statutes, 1957). Thus, the State of Wyoming has protected those within its boundaries from the evils of unregulated liquor traffic and, further, provided protection, through appellate action, to those that have expended their energies and funds necessary and prerequisite to being granted a valid Wyoming liquor license. Respondents in this case are, and have been a holder of a valid liquor license issued under the authority of and subject to the laws of the State of Wyoming.

Further, a liquor license must be renewed annually. If application is made for renewal, and the application denied, an appeal is authorized to the appropriate State District Court (§12-11, Wyoming Statutes, 1957).

SUMMARY OF ARGUMENT

1. The court of appeals did not err in holding the phrase, "non-Indian communities" to be unconstitutionally vague as applied to Respondents. The statute in question is not reasonably understandable because it does not give the beholder an understanding of what is proscribed.

2. The State of Wyoming has sole jurisdiction of this liquor license as the land in question is fee patented and owned by non-Indians. The State of Wyoming has statutory mechanics which embody not only protection to the public, but due process safeguards to the possessor of the liquor license. The Wyoming Supreme Court has held that a liquor license is a privilege and thus, this privilege is protected accordingly. The Tribes' ordinance not only usurps the authority of Wyoming, but completely disregards due process of law.

ARGUMENT

I

THE COURT OF APPEALS DID NOT ERR IN HOLDING THE PHRASE "NON-INDIAN COMMUNITIES" TO BE UNCONSTITUTIONALLY VAGUE AS APPLIED TO RESPONDENTS.

Referring to 18 U.S.C. 1154(c), the court of appeals held:

> **We must hold that the terminology of "non-Indian community" is not capable of sufficiently precise definition to serve as an element of the crime herein considered, aside from other factors or elements with similar infirmities. (487 F. 2d at 18).**

The analysis found on page 17 of the opinion of the court of appeals clearly illustrates the problems with the statute. First, the testimony adduced at the trial shows there was no real agreement on community boundaries. Second, there was uncertainty on the definition of a non-Indian. Most importantly, the government could not carry its burden on proving an essential jurisdictional element of the crime (i.e., that the crime was not committed on fee-patented lands in a non-Indian community). PROOF OF THIS JURISTICTIONAL ELEMENT WAS NOT UPON THE RESPONDENTS. The court of appeals said, "The placing of such a burden on defendants was inproper." (487 F. 2d at 18). The discussion in this paragraph is illustrative of the futility in applying 18 U.S.C. 1154 to the facts before this Court. As stated by this Court in *United States v. National Dairy Products Corp.*, 372 U.S. 29:

> **Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. (372 U.S. at 32-33).**

The simple fact is that Respondents because of the wording of 18 U.S.C. 1154(c) could not "reasonably understand" that their conduct in selling liquor was prohibited.

Petitioner in its brief makes the argument that, "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." (p. 12, Petitioner's Brief). Further, Petitioner argues that Respondents were advised their conduct in selling alcoholic beverages violated the pertinent Federal Statutes. This reasoning is very unsound because if a statute is constitutionally vague, a request to comply with it, coupled with a threat of prosecution, is not going to correct or legitimize the constitutional infirmities. The argument is unsound.

ARGUMENT

II

THE STATE OF WYOMING HAS SOLE JURISDICTION OF RESPONDENTS' LIQUOR LICENSE AND PROVIDES A DUE PROCESS PROCEDURE FOR THE REGULATION OF SAID LIQUOR LICENSE.

Amicus is interested in 18 U.S.C. 1154 not being applied to Respondents, and those similarly situated on the Wind River Indian Reservation, who own fee-patented land. As stated in the "Interest of the State" in this brief, the State of Wyoming has the statutory mechanism to regulate alcoholic beverages for its licensees. These statutes are set out in the "Interest of the State" herein.

Further, *Amicus* is interested in Respondent's situation herein for the reason that Ordinance No. 26 requiring a Tribal license for the Blue Bull Bar conflicts with the sovereign right of the State of Wyoming to license and police those who sell alcoholic beverages in the State.

The Wyoming Supreme Court has held that a liquor license is a privilege. *Johnson v. Smith*, 455 P. 2d 244. A liquor license may be revoked or suspended for violations of the Act, (§12-28, Wyoming Statutes, 1957, 1973 Cum. Supp.), but not without due process safeguards to the licensee. For a recent case involving a thirty-day suspension of a liquor license, *see*, *Rancher Bar and Lounge v. State*, 514 P. 2d 634.

Aside from the fact that the State of Wyoming had issued a license to Respondents and had jurisdiction over the sale of liquor therein, Ordinance No. 26 of the Tribes affords Respondents not a semblance of due process safeguards relating to what the Wyoming Supreme Court has held a privilege. *Johnson v. Smith, supra.* Under the tribal ordinance in question, the Respondents' license and those similarly situated on the Reservation, could have their licenses not issued, suspended, revoked or cancelled, *ex parte* by the Indian Business Council without due process of law and in disregard of the liquor laws of Wyoming. The most unconscionable feature of this procedure of the Tribes is that Respondents have absolutely no voice or vote in the Tribes' governmental decisions on the Reservation.

It is the position of *Amicus* that once Indian title has been extinguished and a non-Indian holds the land in fee, the jurisdiction of the State, for all purposes of government is full and complete.

On the alcoholic beverage question, this Court has spoken in *Clairmont v. United States*, 225 U.S. 551:

> **The simple criterion is that to all lands thus described it was Indian country whenever the Indian title has not been extinguished, and it continued to be Indian country so long as the Indian had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by treaty which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case. (225 U.S. at 556).**

Perrin v. United States, 232 U.S. 478 is distinguishable from this disestablishment theory for the reason that in *Perrin*, the Yankton Sioux ceded lands to the United States. Part of the agreement related to a prohibition against the sale of alcoholic beverages.

The Supreme Court of Wyoming in two (2) cases has

used the disestablishment theory to the effect that extinguishment of Indian title places jurisdiction in the State. In *State v. Moss*, 471 P. 2d 333, the Wyoming Supreme Court concluded that an alleged crime committed within the City of Riverton, Wyoming, which is within the exterior boundaries of the Wind River Reservation, was not within "Indian Country." The defendant was, therefore, subject to the penal laws of the State of Wyoming.

In *Blackburn v. State*, 357 P. 2d 174, a criminal case, Chief Justice Blume of the Wyoming Supreme Court said:

> **Counsel for appellants say that the title to the territory here involved has not been entirely extinguished. They refer particularly to the Act of August 27, 1958, and say that the United States Government in disposing of the land acted merely as agents for the Indians. We think counsel are in error in their conclusions. Construing the Acts of Congress together, we think, as the trial court held, that the title of the Indians to the lands in the territory here involved has been extinguished and that the only right reserved to the Indians is in the money or proceeds received by the United States from the sale or lease of any rights in the land. (357 P. 2d at 179).**

The point is that extinguishment of title places jurisdiction in the State. The foregoing is illustrative of the principle that when Indian title is extinguished, the State assumes jurisdiction. It just isn't a "no man's land".

Referring to the land on which the bar herein is located, the court of appeals said:

> **The appellant's tavern is located within the exterior boundaries of the Reservation on a small tract of land patented in fee by the United States in 1954 under 24 Stat. 390 and 34 Stat. 182 to appellants' predecessor. The patent contains no restrictions as to the use to**

> **which the land may be put. The land is taxed by the State of Wyoming, and the state provides the usual public services for it. It is in a Fremont County School District which provides schools for the area, and on a county road. (487 F. 2d at 16).**

Surely, the State of Wyoming has sole jurisdiction of the liquor license herein.

The State of Wyoming in its sovereign capacity recognizes the self-governing powers of the Indian Tribes including their right, in their sovereign capacity, to regulate tribal members and property within the jurisdictional boundaries of the tribes. However, the Respondents in this matter, located on land that is not within the jurisdiction of the tribes, is thus subject to State regulation.

Finally, *Amicus* will not discuss Arguments II and III found in Petitioner's Brief for the reason that the issues discussed therein are *dicta* in the decision of the court of appeals.

CONCLUSION

For the foregoing reasons, the judgement of the court of appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, Jerome F. Statkus, Assistant Attorney General for the State of Wyoming, do hereby certify that I served the within and foregoing BRIEF OF THE STATE OF WYOMING AS AMICUS CURIAE IN SUPPORT OF THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT upon counsel for Petitioner by placing one copy thereof in the United States mail, postage prepaid, addressed to the respective attorneys of record on September 12, 1974, as follows:

To Robert H. Bork, Solicitor General
Department of Justice
Washington, D. C. 20530

To Wallace H. Johnson, Assistant Attorney General
Department of Justice
Washington, D. C. 20530

To Harry R. Sachse, Assistant to the Solicitor General
Department of Justice
Washington, D. C. 20530

To Jacques B. Gelin, Attorney
Department of Justice
Washington, D. C. 20530

To Lawrence E. Shearer, Attorney
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